

**CALCUTTA HIGH COURT
In The Circuit Bench at Jalpaiguri
Appellate Side**

Present:

The Hon'ble Justice Tapabrata Chakraborty

and

The Hon'ble Justice Biswaroop Chowdhury

CRM (NDPS) 127 of 2024

Sah Jamal

Versus

The State of West Bengal

For the Petitioner : Mr. Aniruddha Biswas, Adv.
Ms. Rima Sarkar, Adv.
Mr. A Pada, Adv.
Ms. Siddi Sethia

For the State : Mr. Aditi Shankar Chakraborty, Ld. APP, Adv.
Mr. Subhasish Misra, Adv.

Judgment Delivered On: 09/04/2024

Biswaroop Chowdhury, J.:

This is an application under Section 439 of the Code of Criminal Procedure filed by the petitioner, who is an accused in Badogra P.S. Case No.217 of 2023 dated 24-05-2023 under Section 21 (c) of the NDPS Act 1985 and is in custody from 24-05-23.

Heard Learned Advocate for the Petitioner and Learned Advocate for the Opposite Party State of West Bengal. Perused the petition filed and materials in the case diary.

Learned Advocate for the Petitioner submits that his client is an innocent person and is falsely implicated in the instant case. Learned Advocate further submits that the sample which was taken from the spot and marked as A1 was sent to CFSL on 30/05/2023 and the sample taken in front of the Magistrate was not sent to the CFSL which is a clear violation of Section 52A of NDPS Act. Learned Advocate also submits that sample which was handed over to the IO by the Learned Magistrate was not sent to the CFSL which is a clear violation of law. Learned Advocate draws attention to the Forensic Examination Report and points out that samples were sent on 30-05-2023, and submits that sample A1 is not the sample taken in front of the Magistrate.

Learned Advocate refers to the decision of the Hon'ble Supreme Court in the case of Samarjit Singh VS State of Punjab reported in 2023 Live Law (SC). 570, and other decisions on this point passed by Co-ordinate Bench of this Court in different bail applications.

Learned Additional P.P. objects the grant of bail but does not dispute the fact that samples were sent after seizure which was not taken in front of Magistrate and not certified.

Before deciding the issue it is necessary to consider the provisions contained in Section 52A of the NDPS Act and Rule 8 and 9 of Narcotic Drugs and Psychotropic Substances (Seizure Storage, Sampling and Disposal) Rules, 2022 referred as said rules.

Section 52A of the NDPS Act provides as follows:

52A. Disposal of seized narcotic drugs and psychotropic substances:-

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, number or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of [such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances in the presence of such Magistrate and certifying the correctness or any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence].

Rule 8 of the said Rules provides that after the seized material under the Act is forwarded to the officer in charge of the nearest police station or to the Officer empowered under Section 53 of the Act or if it is seized by such an officer himself he shall prepare an inventory of such material in Form – 4 and apply to the Magistrate at the earliest under sub-section (2) of section 52A of the Act in Form-5.

As per Rule 9 of the said rules after application to the Magistrate under Sub-section (2) of section 52A of the Act is made, the investigating officer shall ensure that samples of the seized material are drawn in the presence of the Magistrate and the same is certified by the Magistrate in accordance with the provisions of the said sub-section.

In the, case of Samarjit Singh (Supra) the Hon'ble Supreme Court observed as follows:

'8. In paragraphs 15 to 17 of the decision of this Court in *Mohalal's* case, it was held thus:

"15. It is manifest from Section 52-A(2) include (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be certified by him to be correct.

17. The question of drawing samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the

above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with subsections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.”

9. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of *Mohonlal* (Supra). This creates a serious doubt about the prosecution’s case that substance recovered was a contraband.

10. Hence, the case of the prosecution is not free from suspicion and the same has not been established beyond a reasonable doubt.’

11. Thus upon considering the facts of the case and the decisions relied upon, we are of the view that the Petitioner has been able to overcome the rigor of Section 37 of the NDPS Act.

Hence the Petitioner should be granted bail.

12. The Petitioner be released on bail with 2 sureties of Rs. 10,000/- each one of which must be local, subject to the satisfaction of Learned ACJM Mekhliganj. The petitioner upon being released shall meet the I.O. twice a week until further orders and shall not do any act prejudicial to investigation. He shall also attend the Court on all the dates specified for hearing.

(Biswaroop Chowdhury,J.)

(Tapabrata Chakraborty,J)

