

Circuit Bench of Calcutta High Court At Jalpaiguri
CRM (NDPS) 861 of 2023

In re: An application for bail under Section 439 of the Code of Criminal Procedure in connection with **Pradhannagar Police Station** Case No. **167 of 2021** dated **21.03.2021** under Sections **21(c)/22(c)** of the NDPS Act, 1985.

- A n d -

In the matter of : Shiv Kumar & Anr.

.... Petitioners.

Mr. Arunava Paul,

... For the Petitioners.

Mr. Aditi Shankar Chakraborty, Ld. APP

Mr. Sourav Ganguly,

... For the State.

Heard Mr. Paul, learned Counsel for the petitioners and
Mr. Chakraborty, learned Counsel for the State.

The present petition is the fourth bail petition under Section 439 Cr. P.C. filed by the petitioners. Earlier petitioner had filed bail petition being CRM 1291 of 2021, CRM (NDPS) 328 of 2023 and CRM (NDPS) 566 of 2023 which all the three were dismissed by orders dated 28.02.2022, 06.06.2023, and 21.08.2024 respectively passed by this Court.

Now the petitioner has filed the present bail petition. The only submission advanced by learned Counsel for the petitioner is that due to non-compliance of the provisions of Section 52A of the Narcotics Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act'), bail is liable to be granted to the petitioners inasmuch as the samples of the allegedly recovered contraband goods was neither drawn in the presence of a Magistrate nor it was certified.

In support of his submission, learned Counsel for the petitioners has relied upon judgments of Hon'ble Apex Court in the case of **Union of India-vs.-Mohanlal & Anr.**, reported in **(2016) 3 SCC 379** and judgment dated 09.05.2023 in Special Leave to Appeal (Criminal) No. 1958 of 2023 (**Simranjit Singh-vs.-State of Punjab**) and an order of this Court dated 22.09.2023 in CRM (NDPS) No. 692 of 2023 (Fate Ali @ Fateh Ali-vs.-The State of West Bengal).

Learned State Advocate has opposed the bail petition.

We have carefully considered the submissions of learned Counsel for the parties and perused the record of the petition and the case diary as produced by learned Counsel for the respondents.

We prima facie find that twenty thousand tablets of Yaba (synthetic drugs) and 4 kgs of crystal methamphetamine were recovered from the possession of the petitioners on 21.03.2021 and FIR No. 167 of 2021 dated 21.03.2021, Police Station Pradhannagar, District Darjeeling was registered. The Inspector in charge of the aforesaid police station submitted an application dated 21.03.2021 for certification of the Magistrate under Section 52A (3) of the NDPS Act and an endorsement was made by the Judicial Magistrate, 1st Court, Siliguri on the said application that "certified to the correct". However, the signature of the Judicial Magistrate does not bear any date. Thereafter, the Judicial Magistrate, 1st Court, Siliguri passed an order No. 02 dated 25.03.2021, in Misc. (Cert.) Case No. 57 of 2021 which is reproduced below:-

"Received the copy of Order No. 02 dated 25-03-2021 by the Ld. Judge, Special Court (N.D.P.S.

Act), Siliguri for certification of correctness of the inventory, photographs and samples of seized narcotic drugs, psychotropic substances, controlled substances and conveyances as shown in the present case in terms of Section 52 A of N.D.P.S. Act, 1985.

*Register the same as **Misc. (Cert.) Case 57 of 2021***

*The certification will be held on **23.06.2021** at **at** my chamber **at 2.00 PM.***

*Inform **I.O Avishek Lama of Polce, Pradhan Nagar (IO) P.S.** to arrange the needful.*

*To **23-06-2021** for certification. Inform I.O.”*

It appears that the Judicial Magistrate, 1st Court, Siliguri on 25.03.2021 fixed the date for certification for 26.06.2021 in his chamber at 02.00 p.m. i.e., after three months. In the meantime, the Sub-Inspector of Police sent the samples allegedly drawn out of the aforesaid recovered narcotic substance and sent it for examination vide letter dated 04.04.2021, to the Director, Central Forensic Laboratory, DFSS, Ministry of Home Affairs, Government of India, Barkhera Bonder, P.O-Bairagarhkalan, Bhopal and the report dated 02.07.2021 was submitted by the aforesaid Forensic Laboratory.

On 26.07.2021, the Judge, Special Court (NDPS Act) at Siliguri passed an order being No. 12 dated 26.07.2021 which is reproduced below:-

“Order No. 12 dated 26.07.2021:

The record is put up today at the instance of the Ld. PP praying for handing over the chemical report to the I.O of this case so as to complete the investigation.

The application of the Ld. PP is accompanied by the I.C S.I Avishek Lama where in it has been stated that Constable 60 Pradip Roy of STF WB, HQ at Siliguri was sent for collection of the chemical report and the same was handed over to him by CFSL, Bhopal under sealed envelope addressed to this Court. The Sealed envelope is opened in my presence. The chemical report is photocopied and kept with the record and the original chemical report along with the envelope containing seal of CFSL, Bhopal is handed over to S.I Abhishek Lama, Special Task Force, North Bengal HQ (Siliguri)."

From the case diary as produced by the learned State Advocate today before us, it appears that the Judicial Magistrate, 1st Court, Siliguri, passed an order dated 23.08.2021 in Misc. (Cert.) Case No. 57 of 2021, as under:-

"CERTIFICATION ON CORRECTNESS OF INVENTORY, PHOTOGRAPHS AND SAMPLES OF SEIZED CONTRABAND

Being requested by the Ld. Judge, Special Court (NDPS Act) Siliguri vide Order No. 01 dated 23/06./2021 in CR (NDPS) case no. 31 of 2021, I seized 23/06/2021 for holding the process of certification of correctness of Inventory, taking photographs and representative samples of seized contraband. As per order no. 01 dated 23.06.2021 I.O. Avishek Lama, SI, Pradhannagar Police Station, came to my chamber on 23/06/2021 at around 02:00 PM with Six(6) plastic packet containing a Yaba Tablets and Psychotrophe. The said Yaba Tablets and psychotrophe was opened in my presence and found to contain 10,000 Yaba Tablets and 04 kg Psychotrophe of contraband items believed to be Yaba Tablets and Psychotrophe. The said Yaba Tablets and Psychotrophe was found to be duly sealed and leveled.

*The I.O. also brought a weighing machine along with a certificate of verification dated **07/06/2021** issued **by Office of Legal Metrology, Govt. of West Bengal**. The said weighing machine was duly checked by me and found to be correct and in order.*

Thereafter, the said Yaba Tablets and Psychotrophe was weighed and on the weighing machine. The said packet containing the contraband items were then kept aside. Thereafter, representative samples of the seized contraband were drawn out, from the said plastic packet and placed inside two another plastic packet (Psychotrophe 20 gms and Yaba Tablets 200 pic), both of which were sealed and leveled in my presence by I.O. Avishek Lama, SI, Pradhannagar Police Station.

The entire process was also photographed by a photographer brought by the I.O. The inventory as per seizure list produced before me was found correct and in order. The printed photographs so obtained by the photographer 23.06.2021 and a certificate by the said photographer was produced by I.O. on 23-06-2021 ay my chamber. The same were found to be correct and proper also.

Therefore, I have prepared this Certificate of Correctness of inventory, photographs and samples of seized contraband in my office. The newly sealed and lebeled envelopes along with the certificate, the photographs and the DVD containing the digital images are hereby handed over to I.O Avishek Lama, SI, Pradhannagar Police Station.

Date: 23.08.2021

Enclosures:

- 1. 04 sheets containing 12 photographs.*
- 2. Certificate by the photographer.*
- 3. Photocopy of certificate of verification dated 07/06/2021 by the office of the controller of legal metrology, govt. of West Bengal.*
- 4. One D.V.D containing the digital image.*

Assisted by I.O. Avishek Lama, SI Pradhannagar Police Station.”

On the afore-noted facts, prima facie it appears that there was laches on the part of the prosecution with regard to the compliance of provisions of Section 52A of the NDPA Act, but the

rigour of Section 37 of the NDPA Act is also required to be noticed.

Section 37 of the NDPS Act is reproduced below:-

“S. 37. Offences to be cognizable and non-bailable._(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)_

(a) Every offence punishable under this Act shall be cognizable;

*(b) **No person** accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] **shall be released on bail or on his own bond unless—***

(i) The Public Prosecutor has been given an opportunity to oppose the application for such release, and

*(ii) Where the Public Prosecutor opposes the application, **the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.***

(2) The limitations on granting of bail specified in clause (b) of sub-Section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting bail.]”

On the facts as available in the case diary and also as submitted by the learned Counsels for the parties, we find that one of the co-accused namely, Sankar Barik @ Shankar Barik in CRM (NDPS) No. 67 of 2022 was granted bail by order dated 13.04.2022 passed by this Court and accordingly, the aforesaid Sankar Barik was released. The aforesaid Sankar Barik is not appearing and as such there is delay in concluding the trial. Therefore, faced with this situation, the learned Trial Court has issued a proclamation dated 21.02.2023 requiring the presence of the aforesaid accused Sankar Barik. Execution of proclamation is in process and the

aforesaid accused Sankar Barik enlarged on bail by order of this Court dated 13.04.2022 has not appeared before the Trial Court. In other words, the aforesaid accused Sankar Barik is avoiding his appearance resulting in non-conclusion of the trial.

Sub-clause (ii) of Clause (b) of Sub-Section (1) of Section 37 of the NDPS Act provides that **no person** accused of an offence punishable for offence under Section 19 or Section 24 or Section 27A and also for offence involving commercial quantity **shall be released on bail** or on his own bond unless the Public Prosecutor has been given an opportunity to oppose the application for such release, and where the Public Prosecutor opposes the application, then bail may be granted if the Court is satisfied that **there are reasonable grounds for believing that the accused is not guilty of such offence and he is not likely to commit any offence while on bail.**

From the facts available on record, we find that the **first bail petition** being CRM 1291 of 2021 was dismissed by this Court by order dated 28.02.2022 observing that the record would reveal that the charge sheet was submitted before an application for bail was filed by the petitioners and, therefore, we do not find any ground for taking exception to Section 37 of the NDPS Act. The **second bail petition** being No. CRM (NDPS) 328 of 2023 was dismissed by this court by order dated 06.06.2023 observing that the trial has commenced and PW 1 has been examined and on consideration of the material on record and the seizure memo showing recovery of narcotic substance above commercial quantity

and the FSL report suggests the substance of narcotic and that the trial has commenced. The Learned Judge, Special Court under NDPS Act, Siliguri was requested to expedite the trial and strictly follow section 309 of the Code of Criminal Procedure.

The **third bail petition** being CRM (NDPS) 566 of 2023 was dismissed by this Court dated 21.08.2023, noticing the fact of non-appearance of the aforesaid co-accused, Sankar Barik and observed that considering all the materials, which reflect about the prima facie involvement of the accused petitioner with the alleged offence, prayer for bail filed by the accused petitioner is rejected. However, the Court directed to expedite the trial without granting unnecessary adjournment to either of the parties.

In the case of **Mohanlal & Anr. (supra)**, the Hon'ble Apex Court considered Section 52A of the NDPS Act and observed as follows:-

*“..... The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provisions, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as in mandated by sub-section (3) of Section 52A (supra). **We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of this laws and procedures and cavalier manner in which the agencies and at times***

Magistracy in this country addresses a problem of such serious dimensions.”

The judgment in the case of **Mohanlal & Anr. (supra)** was followed by Hon'ble Apex Court in the case of **Simranjit Singh (supra)** on the ground that serious doubt about the prosecution's case is created that the substance recovered was a contraband and accordingly the conviction and sentence was quashed.

We find that the judgment in the case of **Simranjit (supra)** was passed in a Criminal Appeal No. 1443 of 2023 and the conviction was set aside on the ground of suspicion. The judgment in the case of **Mohanlal & Anr. (supra)** was also passed in criminal appeal.

In the present set of facts, trial is yet to be concluded. Even if there has been some latches on the part of the prosecution in compliance of Section 52A of the NDPS Act, it cannot be said that solely on this ground a bail can be granted overlooking Section 37 of the NDPS Act.

In the present set of facts, considering the huge recovered quantity of narcotic substance as afore-noted, non-appearance co-accused who was enlarged on bail by this Court, the rejection of three bail petitions of the petitioners as afore-noted, the conduct of the prosecution and the facts of the present case as briefly narrated above, *prima facie* we are satisfied that reasonable ground does not exist for believing that the petitioner is not guilty of such offence or that he is not likely to commit offence while on bail. Under the

circumstances, we do not find the present case to be a fit case to enlarge the petitioners on bail.

Consequently, CRM (NDPS) 861 of 2023 is dismissed.

However, we direct the concerned Court to conclude the trial very expeditiously preferably within six months. We also direct the prosecution to take all necessary steps so that trial may be concluded very expeditiously.

Urgent certified copy of this order, if applied for, be supplied to the learned Counsel for the respective parties.

(Surya Prakash Kesarwani, J.)

(Rai Chattopadhyay, J.)