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CrI.O.P.No.25771 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.02.2024

CORAM

THE HONOURABLE **MR. JUSTICE G.CHANDRASEKHARAN**

CrI.O.P.No.25771 of 2023

Raju

... Petitioner

Vs.

The State represented by
The Inspector of Police,
D-3, Kanagamma Chathiram Police Station,
Tiruvallur District.
Crime No.235 of 2022

... Respondent

PRAYER: This Criminal Original Petition filed under Section 439 of Cr.P.C., praying to enlarge the petitioner on bail pending trial in C.C.No.53 of 2023 on the file of the I Additional Special Judge, NDPS Act cases, Chennai.

For Petitioner : Mr.M.S.Charles for Mr.O.Chembulingam

For Respondent : Mr.J.Subbiah,
Government Advocate(CrI side)



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ORDER

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The Criminal Original Petition is filed to enlarge the petitioner/A2 on bail in CC.No.53 of 2023 pending on the file of the Court of 1st Additional Special Court for Exclusive Trial of cases under NDPS Act, Chennai.

2. The case of the prosecution in brief is that, on 14.09.2022 the defacto complainant received a secret information at about 9:00 a.m., that 3 persons would bring ganja for sale at about 10:30 a.m. near Venkatapuram junction. The defacto complainant recorded the information, obtained necessary permission and mounted surveillance along with police party at the spot from 9.05 a.m. At about 9.30 a.m., three persons came from the direction of Nagari, Andra Pradesh to Venkatapuram, each holding sacks in their hands. On being identified by the informant, they were apprehended and they are one Muruganandam, Raju, and Suresh Pandian. The accused were informed about the secret information that, they possess ganja and they were offered to be taken before the learned Judicial Magistrate/Government Officer for physical search. They refused the offer and preferred the defacto complainant to search them. Accordingly, a



search was conducted. During the search, 5 kgs of ganja was found in the sack held by Muruganandam, ganja of 8 kgs each were found in the sacks held by Raju and Sureshpandian. Ganja was seized from the accused and put together, which weighed about 21 kgs in aggregate. The seized ganja was clubbed and two samples each weighing 50 grams of ganja were taken and marked as S1 and S2. The remaining ganja was kept in a plastic bag, sealed and marked as P1 and three sacks in which ganja was kept were seized and marked as P2. The accused were arrested and their confessional statements were recorded. Then the case was registered.

3. Learned counsel for the petitioner pressed for bail on the following grounds, viz.,

- (i) *The allegation that accused was found with ganja of 8 kgs is not true.*
- (ii) *Assuming that ganja was seized from the petitioners, no proper procedure was followed at the time of taking the samples. The guidelines issued for taking samples was violated.*
- (iii) *As per Section 57 A of NDPS Act, the sample should have been taken in the presence of learned Judicial Magistrate, but that procedure was not followed.*



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(iv) *If the sample is not taken, as per the law and guidelines issued, the accused is even entitled for acquittal. When the accused is entitled for acquittal for not following the procedure at the time of taking samples, it goes without saying that the accused is entitled for bail as well.*

(v) *Though it is claimed by the prosecution that, the accused was found at the same spot, at the same date and time, along with ganja, there is no evidence produced to show that, where did the accused procure ganja and whether there was any common intention or conspiracy among them to buy and bring commercial quantity of ganja for the purpose of sale. There is absolutely no evidence collected in this regard.*

4.1 When that being the case, the accused can be charged only for possession of quantity of ganja seized individually and not collectively for possession of commercial quantity, on the premise that they are in joint possession of commercial quantity of ganja.

4.2. In support of his submissions, he relied on the following judgments.

(i) *Noor Aga Vs. State of Punjab reported in [2008 16 SCC 417]*

(ii) *Netram Vs. State of Rajasthan reported in [CDJ 2013 Raj HC 642]*

(iii) *Wali Hassan Vs. State of Uttar Pradesh in*



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Crl.M.Bail.Appln.18303 of 2020 ;

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(iv) Naveen Jat Vs. State of Madhya Pradesh in MCRC.No.19405 of 2022;

(v) Simarnjit Singh Vs. State of Punjab in Crl.A.No.1443 of 2023.

4.3. Learned counsel for the petitioner submitted that, petitioner is innocent. He is falsely implicated as an accused in this case. He is in judicial custody from 14.09.2022. Assuming without admitting that ganja was recovered from the petitioner, he can only be charged for possessing 8 kgs of ganja. He cannot be charged for joint possession of 21 kgs of ganja along with other accused.

5. In response, learned Additional Public Prosecutor submitted that, admittedly the sample was not taken in the presence of learned Judicial Magistrate. However, this cannot be canvassed now. It is a matter for trial. The petitioner along with other two accused were found at the same place, at the same date and time with ganja. They jointly procured ganja from Andra and possessed 21 kgs of ganja, which is a commercial quantity. Therefore, it cannot be claimed that, petitioner cannot be charged along with other accused, with a charge of possession of commercial quantity of ganja.



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Thus, he seeks dismissal of this petition.

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5.1. In support of his submissions, he relied on the following judgments, viz.,

(i) Union of India Vs. MD.Nawaz Khan reported in [2021 10 SCC 100]

(ii) Arvind Yadav Vs. Government of NCT Delhi reported in [2021 SCC online Del 3619]

6. Considered the rival submissions and perused the records.

7. As detailed above, the accused in this case, was said to have been found with illegal possession of 8 kgs of ganja. The sample was taken at the spot in the presence of witnesses. It is true that sample was not taken in the presence of learned Judicial Magistrate.

8. Learned counsel for the petitioner circulated a copy of the notification of the Ministry of Finance (Department of Revenue) dated 23.12.2022 in G.S.R.899(E), with regard to seizure and storage of seized material, sampling and disposal under NDPS Act.

(i) Chapter III of the notification deals with sampling. The relevant



rules of Chapter III are as follows:

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"8. Application to Magistrate.- 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.

9. Samples to be drawn in the presence of Magistrate. - 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.

10. Drawing the samples. -(1) One sample, in duplicate, shall be drawn from each package and container seized.

(2) When the packages and containers seized together are of identical size and weight bearing identical marking and the contents of each package give identical results on colour test by the drugs identification kit, conclusively indicating that the packages are identical in all respects, the packages and containers may carefully be bunched in lots of not more than



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ten packages or containers, and for each such lot of packages and containers, one sample, in duplicate, shall be drawn:

Provided that in the case of ganja, poppy straw and hashish (charas) it may be bunched in lots of not more than forty packages or containers.

(3) In case of drawing sample from a particular lot, it shall be ensured that representative sample in equal quantity is taken from each package or container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot."

9. It is the submission of the learner counsel for the petitioner that, respondent has not followed the rules contemplated in the Standing Order. He relied on the judgement reported in "**Noor Aga Vs State of Punjab**" in [2008 16 SCC 417] for the proposition that, the guidelines in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon, so that sanctity of physical evidence in such cases remains intact.

9.1. The Order in Crl.Misc.bail.18303 of 2020 passed by the Allahabad High Court in "**Wali Hassan Vs State of UP**" is relied for the



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same proposition. It is observed in this Order that, the instruction given in the Standing Order / Instruction No.1 of 1989 dated 13.6.1989 are mandatory in nature.

9.2. The judgement reported in CDJ 2013 Raj HC 642 in the case of ***Netram Versus State of Rajasthan*** is relied for the proposition that, it is advisable to draw one sample in duplicate from each package/container, in case of seizure of more than one package/container. In case of seizure of Ganja and Hashish, the packages/containers may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample in duplicate may be drawn. (i) It is observed in paragraph 10 that, Investigating Officer is under an obligation to collect separate samples from each of the gunny bags, so that the analysis of contents of the each of gunny bag could be performed individually.

9.3. The order passed in MCRC.No.19405 of 2022 dated 19.04.2022 by Madhya Pradesh High Court is relied for the proposition that, the Standing order is obligatory on the part of subordinate authorities to comply therewith.

9.4. He further submitted that, there should be evidence to come to a



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conclusion that, there exists some kind of abetment or the criminal conspiracy between the accused within the meaning under Section 29 of NDPS Act. However, in this case, there is no such evidence. In this regard, he relied on the judgement reported in AIR 2005 SCC 4248 in the case of Amrsingh Ramjibhai Barot Vs. State of Gujarat.

9.5. The Judgment in Crl.O.P.No.1443 of 2023 in the case of Simarnjit Singh Vs. State of Punjab is relied for the proposition that, failure to comply with the procedure under Section 52-A of NDPS Act is fatal to the case of the prosecution.

9.6. The relevant portion of the Judgment is as follows:

"7. We have perused the evidence of PW-7 Hardeep Singh in which he has stated that from the eight bags of poppy husk, two samples of 250 gms each were drawn and converted into 16 parcels. This has been done immediately after the seizure.

8. In paragraphs 15 to 17 of the decision of this Court in Mohanlal's case¹, 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 in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. 17. The question of drawing of 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 Mohanlal1. 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. Accordingly, we set aside the impugned judgments insofar as the present appellant is concerned and quash his conviction and sentence."

10. To impress the necessity of sampling process and to fix the quantity of the contraband seized, the Judgment reported in AIR 1993



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Supreme Court 1456 is relied. It is observed in paragraph 5 as follows:

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"5.The next and most important submission of Shri Lalit Chari, the learned senior counsel appearing for the appellant is that both the courts below have erred in holding that the accused was found in possession of 12 gins. of Charas. According to the learned counsel, only a small quantity i.e. less than 5 gms. has been sent for analysis and the evidence of P.W.1, the Junior Scientific Officer would at the most establish that only that much of quantity which was less than 5 gms. of Charas is alleged to have been found with the accused. The remaining part of the substance which has not been sent for analysis can not be held to be also Charas in the absence of any expert evidence and the same could be any other material like tobacco or other intoxicating type which are not covered by the Act. Therefore the submission of the learned counsel is that the quantity proved to have been in the possession of the accused would be small quantity as provided under Section 27 of the Act and the accused should have been given the benefit of that Section. Shri Wad, learned senior counsel appearing for the State submitted that the other piece of 7 gms. also was recovered from the possession of the accused and there was no need to



send the entire quantity for chemical analysis and the fact that one of the pieces which was sent for analysis has been found to contain Charas, the necessary inference would be that the other piece also contained Charas and that at any rate since the accused has totally denied, he can not get the benefit of Section 27 as he has not discharged the necessary burden as required under the said Section. Before examining the scope of this provision, we shall first consider whether the prosecution has established beyond all reasonable doubt that the accused had in his possession two pieces of Charas weighing 7 gms. and 5 gms. respectively. As already mentioned only one piece was sent for chemical analysis and P.W.1, the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. From this report alone it can not be presumed or inferred that the substance in the other piece weighing 7 gms. also contained Charas. It has to be borne in mind that the Act applies to certain narcotic drugs and psychotropic substances and not to all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused. In view of the evidence of P.W.1 it must be held that the prosecution has proved posi- tively that Charas weighing



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about 4.570 gms. was recovered from the accused. The failure to send the other piece has given rise to this inference. We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law."

11. Learned Additional Public Prosecutor relied on the judgement reported in [2021 (10) SCC 100] in the case of ***Union of India Vs. MD.Nawaz Khan***, for the proposition that, petitioner was in conscious possession of 8 kgs of ganja. Conscious possession means knowledge of possession of contraband and it has to be gleaned from the facts and circumstances of the case. Possession could mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as



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to the existence of the contraband and the intention based on such knowledge.

12. He relied on the order reported in [2021 SCC Online Del 3619], in the case of *Arvind Yadav in JC Vs. Government of NCT Delhi* for the proposition that, the compliance/non-compliance under Section 52A of NDPS Act is a matter to be considered at the time of trial and the non-compliance would not be a ground for granting bail.

12.1. In a Judgment reported in CDJ 2013 Raj HC 642 in the case of *Netram v. State of Rajasthan*, in considering the Standing Instruction No. 1/88 issued by the Narcotics Control Bureau, New Delhi, with regard to the taking of samples, it is extracted as follows:

As per the instruction of 1.7,

(a) In the case of seizure of a single package/container one sample in duplicate is to be drawn.

(b) when the package/containers seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by U.N. Kit, conclusively indicating that the packages are identical in all respect/the



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packages/container may be carefully bunched in lots of 10 packages/containers. In case of seizure of Ganja and Hashish, the packages/containers may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample in duplicate may be drawn.

Similar instruction is given in the Standing Order No. 01 of 1989 dated 13.06.1989. The relevant portion are extracted as follows,

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

2.5 However, when the packages/containers seized together are of identical size and weight, bearing identical markings and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects the packages/container may be carefully bunched in lots of 10 package/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



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packages/containers, one sample (in duplicate) may be drawn.

13. Admittedly, the case of the prosecution in this case is that, petitioner/accused said to have possessed 8 kgs of ganja in separate sacks held by him. Then, the defacto complainant seized the ganja from him and from other two accused, bunched the ganja into one lot of 21 kgs. Thereafter, he had taken two samples, each weighing 50 grams. It appears that, there was no drug detection test conducted, to find out whether the contents of each ganja packages give identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects. Without doing a colour test by U.N. Kit, to find out, as to whether the contents of each package give identical results on colour test, samples were taken in this case, after bunching the ganja said to have been possessed by the accused.

14. It is the submission of the learned counsel for the petitioner that, when bunching is not properly done to give a representative character of the sample, the accused would be greatly pre-judiced. Either the samples should



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have been taken from the ganja said to have been seized from the accused individually or proper bunching should have been done. In the absence of the both, it can only be held that, no proper sampling procedure was followed, putting the accused under great disadvantage and pre-judice.

15. In the case of *Amarsingh Ramjibhai Barot v. State of Gujarat* reported in [AR 2005 SCC 4248], the accused Amarsingh and deceased Danabhai were prosecuted under Sections 21(c) and 29 of NDPS Act. The appellant/accused was found carrying a plastic bag, containing black colour liquor substances. The weight of substances was found to be 920 grams. Then they also found 4.250 kgs of grey colour substance, suspected to be a drug recovered from the deceased Danabhai. Out of 920 grams seized from the accused, two samples of 10 grams each, were drawn and samples were forwarded to Forensic Science Laboratory (FSL). The Forensic Science Laboratory (FSL) gave opinion that, the substance was opium as described in the NDPS Act containing 2.8% anhydride morphine, and also pieces of poppy flowers (posedoda). The sample recovered from deceased Danabhai was found to be “opium” as described in the NDPS Act having 1.2% anhydride morphine, also containing pieces of poppy flowers (posedoda).



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15.2. The trial Court convicted and sentenced the accused for individually and jointly possessing 920 grams opium and 4.250 kgs opium.

The Trial Court came to the conclusion that, appellant/ accused was liable to be convicted under section 21(c) and Section 21(c) read with 29 of NDPS Act for individually being in possession with 920 grams and being jointly in conspiracy with the deceased accused, in possession of 4.250 kgs of prohibited substances.

15.3. The High Court, however, was of the view that the conviction of the appellant under section 17 and 18 read with section 29 of the NDPS Act was not correct. On the other hand, the High Court came to the conclusion that the appellant was liable to be convicted under Section 21(c) and also under Section 21(c) read with Section 29 of the Act, for individually being in possession of 920 grams and for being jointly, in conspiracy with the deceased, in possession of 4.250 kgs. of the prohibited substance recovered. In the view of the High Court, the total amount of prohibited substance recovered (personally from the appellant and also from the joint possession of the two accused) being more than "commercial quantity" as defined under the applicable notification, the appellant was liable to be visited with



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the minimum punishment of 10 years rigorous imprisonment plus fine of Rs.

1 lakh. The High Court was also of the view that, even if the quantity of 920 grams recovered from the appellant alone were to be considered, it would warrant conviction under Section 21(c) and the minimum sentence of 10 years rigorous imprisonment plus fine of Rs. 1 lakh.

15.4. The question arose before the Hon'ble Supreme Court of India is that, whether the appellant / accused could have been punished for purchasing commercial quantity under Section 21(c) of the NDPS Act. The Hon'ble Supreme Court of India was of the opinion that, there was no warrant for the conclusion reached by the High Court, as there is no evidence to suggest that, there was any abetment and/or criminal conspiracy within the meaning of Section 29 of the NDPS Act. The appellant and Danabhai Virabhai Rabari were found together, but individually carrying the recovered substances. Hence, it was not possible for the High Court to take the view that Section 29 of NDPS Act was attracted.

16. Here, in this case, as already narrated above, the petitioner along with two other accused said to have been found at the same place, on the same date, at the same time with 8 kgs of ganja. There is no material



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produced to show that, before converging at the place where they were apprehended, the accused had earlier met and conspired to purchase ganja for the purpose of sale. There is no material, except the confessional statements, produced to show, the source from where the accused had procured ganja, whether it is a common source or a different source; Whether the accused jointly purchased or individually purchased? There is no answers to these questions.

17. Only incriminating material available is the confessional statements of the accused, to show that, they procured ganja in Andhra. There is no other material collected to substantiate the procurement in Andhra. In the absence of corroborative evidence, it cannot be held that, accused had jointly procured ganja in Andhra. In the said circumstances, whether the accused can be charged with the aid of section 29 of NDPS Act is a question.

Section 223 CrPC deals with what persons could be charged jointly.

This reads as follows,

a) persons accused of the same offence committed in the course of the same transaction;



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b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

c) persons accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;

d) persons accused of different offences committed in the course of the same transaction; e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;

f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860) or either of those sections in respect of stolen property the possession of which has been transferred by one offence; g) persons accused of any offence under Chapter XI I of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as



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may be, apply to all such charges; Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate or Court of Sessions may, if such persons by an application in writing, so desire, and if he is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together.

18. While interpreting Section 223 CrPC, the Hon'ble Supreme Court of India in **MS. P xxx versus STATE OF UTTARAKHAND & ANR.** 2022 Livelaw SC 554 observed as follows,

20.1. In the case of Mohan Baitha and Ors. v. State of Bihar and Anr.: (2001) 4 SCC 350, this Court observed that the expression 'same transaction', from its very nature, was incapable of an exact definition and it was not possible to enunciate any comprehensive formula of universal application for the purpose of determining whether two or more acts constitute the same transaction. However, this Court indicated a few factors, which would be relevant to decide this question in a given set of facts. In that case, on the complaint of the father of deceased, FIR was lodged for



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offences under Sections 304- B/34/406 IPC at Police Station Nath Nagar in the District of Bhagalpur, Bihar. Police report was filed on 03.04.1999 after completion of investigation. However, the accused approached the High Court, seeking direction to the Magistrate not to proceed with the matter on the grounds of lack of territorial jurisdiction, as the offence under Section 304-B IPC had taken place at Jahanaganj in the State of Uttar Pradesh and the Court at Bhagalpur was lacking in territorial jurisdiction to try the same. The High Court dismissed the petition of the accused. In further appeal, this Court also observed that the acts formed parts of the same transaction, which came under the ambit of Section 220 CrPC; and directed the Magistrate at Bhagalpur to proceed with the matter expeditiously. This Court, while expounding on Sections 177 and 220 CrPC, observed and laid down as under: -

“4.....Section 177 of the Code of Criminal Procedure on which Mr Mishra relies, uses the expression “ordinarily”. The use of the word “ordinarily” indicates that the provision is a general one and must be read subject to the special provisions contained in the Criminal Procedure Code. That apart, this Court has taken the view that the exceptions implied by the word “ordinarily” need



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not be limited to those specially provided for by the law and exceptions may be provided by law on considerations of convenience or may be implied from other provisions of law permitting joint trial of offences by the same court..... It may be noticed that under Section 220 of the Code of Criminal Procedure, offences more than one committed by the same persons could be tried at one trial, if they can be held to be in one series of acts, so as to form the same transaction. The expression “same transaction” from its very nature is incapable of an exact definition. It is not intended to be interpreted in any artificial or technical sense. Common sense and the ordinary use of language must decide whether on the facts of a particular case, it can be held to be in one transaction. It is not possible to enunciate any comprehensive formula of universal application for the purpose of determining whether two or more acts constitute the same transaction. But the circumstances of a given case indicating proximity of time, unity or proximity of place, continuity of action and community of purpose or design are the factors for deciding whether certain acts form parts of the same transaction or not. Therefore a series of acts whether are so connected together as to form the same transaction is purely a question of fact to be decided on the aforesaid criteria.”



(emphasis supplied)

20.2. *The said decision in Mohan Baitha (supra) has further been referred to and relied upon by this Court in the case of Anju Chaudhary v. State of Uttar Pradesh and Anr.: (2013) 6 SCC 384 while indicating the tests to be applied for determining the question as to whether two or more acts constitute the same transaction. This Court observed and explained as under: -*

“43. It is true that law recognises common trial or a common FIR being registered for one series of acts so connected together as to form the same transaction as contemplated under Section 220 of the Code. There cannot be any straitjacket formula, but this question has to be answered on the facts of each case. This Court in Mohan Baitha v. State of Bihar (SCC pp. 354-55, para 4) held that the expression “same transaction” from its very nature is incapable of exact definition. It is not intended to be interpreted in any artificial or technical sense. Common sense in the ordinary use of language must decide whether or not in the very facts of a case, it can be held to be one transaction.

44. It is not possible to enunciate any formula of universal application for the purpose of determining whether two or more acts constitute the same transaction.



Such things are to be gathered from the circumstances of a given case indicating proximity of time, unity or proximity of place, continuity of action, commonality of purpose or design. Where two incidents are of different times with involvement of different persons, there is no commonality and the purpose thereof different and they emerge from different circumstances, it will not be possible for the court to take a view that they form part of the same transaction and therefore, there could be a common FIR or subsequent FIR could not be permitted to be registered or there could be common trial.

45. Similarly, for several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action. Thus, where there is a commonality of purpose or design, where there is a continuity of action, then all those persons involved can be accused of the same or different offences “committed in the course of the same transaction”.

(emphasis supplied)

20.3. Thus, in the aforesaid decisions in Mohan Baitha and Anju Chaudhary, this Court has underscored that the expression ‘same transaction’ seems to be having vague



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underpinnings; and pointed out that no formula of universal application could be enunciated for determining as to whether two or more acts constitute the same transaction. However, even while pointing out that the question as to whether a series of acts are so connected together as to form the same transaction is purely a question of fact, this Court has indicated the core elements like proximity of time, unity or proximity of place, continuity of action and community of purpose or design, which are of relevant considerations and when these factors are applied to common sense and ordinary use of language, the vexed question of 'same transaction' could be reasonably determined. "

19. Thus, it is essential that, core elements like proximity of time, unity or proximity of place, continuity of action and community of purpose or design are relevant considerations to decide, whether the act constitutes in the course of "same transaction".

20. In Crl.R.C.No.425 of 2014, in the case of ***R.Dineshkumar @ Deena Vs.The State and others***, it is observed as follows, "12. For several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause



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and effect, or as principal and subsidiary, so as to result in one continuous action. Thus, where there is commonality of purpose or design, where there is continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction,"

21. At the risk of repetition as indicated above, except for the fact that, the accused said to have been found with ganja, at the same place, at the same time and date, there is no material available to show that, the accused had continuity of action and community of purpose or design, so as to bring their act of possession to constitute, commission of offence in the course of same transaction. Therefore, this Court is of the view that, petitioner cannot be prosecuted for the possession of alleged commercial quantity of ganja, but can only be prosecuted for the individual possession of ganja. Sampling is not done as per the standing instructions. It would certainly prejudice the accused.

22. The petitioner, namely, Raju said to have been possessed 8 kgs of ganja along with other accused. He is in judicial custody for more than a year. Till date, trial is not commenced. He can be charged only for the



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individual possession of ganja and cannot be charged for possessing commercial quantity of ganja. Therefore, rigour of Section 37 of NDPS Act is not applicable to this case.

23. Taking note of the facts and circumstances and the reasons stated above, this Court is inclined to grant bail to the petitioner with conditions. Accordingly, petitioner is ordered to be released on bail on their executing a bond for a sum of Rs.25,000/- (Rupees Twenty Five Thousand only) with two sureties, each for a like sum to the satisfaction of the learned I Additional Special Judge, under (NDPS & EC Act) Court, Chennai and on further conditions that :-

[a] the sureties shall affix their photographs and Left Thumb Impression in the surety bond and the Magistrate may obtain a copy of their Aadhar card or Bank pass Book to ensure their identity.

[b] the petitioner shall report before the respondent police daily morning at 10.00 a.m., until further orders. [c] the petitioner shall not abscond either during investigation or trial.

[d] the petitioner shall not tamper with evidence or witness either during investigation or trial.



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[e] On breach of any of the aforesaid conditions, the learned Magistrate/Trial Court is entitled to take appropriate action against the petitioner in accordance with law as if the conditions have been imposed and the petitioner released on bail by the learned Magistrate/Trial Court himself as laid down by the Hon'ble Supreme Court in P.K.Shaji vs. State of Kerala [(2005)AIR SCW 5560].

[g] If the accused thereafter absconds, a fresh FIR can be registered under Section 229A IPC.

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07.02.2024

To

1. I Additional Special Judge, under (NDPS & EC Act) Court, Chennai.
2. The Inspector of Police,
D-3, Kanagamma Chathiram Police Station,
Tiruvallur District.
3. Central Prison, Puzhal.
4. The Public Prosecutor,
High Court of Madras.



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