



2024:DHC:3144



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Pronounced on: 23.04.2024*+ **BAIL APPLN. 1173/2023**
MOHIT YADAV

..... Petitioner

Through: Mr. A.K.Sahu & Mr. Lalatendu Sahu,
Advocates.

versus

STATE OF NCT, DELHI

..... Respondent

Through: Mr. Amol Sinha, APP for State with
SI Ram Kumar, PS Crime Branch.**CORAM:**
HON'BLE MR. JUSTICE VIKAS MAHAJAN**JUDGMENT****VIKAS MAHAJAN, J.**

1. The present petition has been filed under Section 439 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C) seeking grant of regular bail to the petitioner in FIR No. 21/2021 under Sections 20 and 29 NDPS Act registered at P.S. Crime Branch.
2. *Vide* order dated 12.04.2023, notice was issued in the bail application of the petitioner and the State was directed to file a status report. The State has filed status reports dated 12.05.2023 and 13.07.2023, which form part of the record.
3. The case of the prosecution as borne out from the status report filed by the prosecution is that on 10.02.2021, secret information was received that Mohit Yadav (the petitioner herein) and co-accused namely, Subhash



Chander were carrying cannabis (*ganja*) in the truck in which they were travelling. Accordingly, the petitioner and the co-accused were apprehended at over bridge DND Ring Road, Delhi with one truck bearing registration number UP81AF7152 containing 116.500 Kg. of cannabis (*Ganja*) in 05 plastic bags. The petitioner was arrested in the present case on the same day.

4. Accordingly, the present FIR came to be registered and investigation was taken up by ASI Danvir Singh. During investigation, it was disclosed by the petitioner that the said contraband was to be delivered to one Prince, resident of Noida, Uttar Pradesh.

5. On 15.02.2021, proceedings under Section 52A NDPS Act were conducted before the learned Metropolitan Magistrate and samples were taken out from each Pulanda of recovered Cannabis (*Ganja*). Thereafter, on 16.02.2021 samples were deposited in FSL Rohini vide FSL No. SFSL(DLH)/1629/CHEM/607/21 for obtaining expert opinion which was subsequently received vide SFSL(SLH)/1629/CHEM/607/21 dated 21.06.2021.

6. Investigation *qua* the owner of the truck was then taken up, whose registered owner was revealed to be Srinivas R/o Village Ratori, who stated that he had sold the truck to one Pushpender Gupta for Rs. 6 lacs and provided an affidavit in this regard. Thereafter, Pushpender Gupta was also interrogated and he accepted that he had bought the truck and had handed it over to the petitioner for transportation from Delhi to Odisha but did not reveal anything about the recovered contraband.

7. It is stated in the status report that the petitioner disclosed in his disclosure statement that he was directed by Prince to meet Sushant @ Badakulu Ladu in Odisha and accordingly, the petitioner met him in Odisha



and he handed over 05 packets of *ganja* to the petitioner to be transported, with which the petitioner was apprehended in Delhi.

8. The learned counsel appearing on behalf of the petitioner at the outset submits that the petitioner is a young man who has been falsely implicated in the present case. He submits that recovery from the petitioner in the present case is doubtful as no independent witness was joined at the time of recovery. He submits that the stand of the prosecution that no independent witnesses had agreed to join as witness to the recovery proceedings, cannot be believed.

9. He submits that it is improbable that the petitioner was the driver of the offending truck, in as much as, the petitioner does not have a driving licence. He further submits that it was the co-accused who loaded the Jawar and not the petitioner, thus conscious possession of the contraband cannot be attributed to the petitioner. He also submits that the incident has not been videographed by the respondent/prosecution.

10. Drawing the attention of the Court to the nominal roll dated 09.05.2023, it is submitted that as on 09.05.2023 the petitioner has been in custody for a period of 02 years and 21 days. Accordingly, it is submitted that as on date the petitioner has spent about 2 years and 10 months in custody. It was also submitted that investigation *qua* the petitioner is complete as the State has already filed its charge-sheet against the petitioner and no further recovery is to be made from the petitioner.

11. The learned counsel also referred to the proceedings conducted under Section 52A of the NDPS Act (Annexed as Annexure C to the paperbook) to submit that the proceedings conducted were defective. He submits that admittedly there were five *pulandas* and admittedly each *pulanda* contained



different quantities of contraband. He submits that the said *pulandas* contained several brown colour bundles but it has not been specified as to how many bundles were there in each *pulanda* and from which bundle in *pulanda* the samples were obtained. To buttress his contention, reliance was placed on the judgment of this Court in ***Basant Rai v. State of Delhi***.¹

12. *Per contra*, the grant of bail is opposed by Mr. Amol Sinha, ASC for the respondent/NCB, who argued on the lines of the status report. He submits that the offence is of serious nature and the quantity of contraband recovered in the present case is commercial, therefore, the petitioner has to satisfy the twin conditions mentioned in Section 37 of the NDPS Act before being released on bail. He further submits that the CDR's of the petitioner herein were analyzed and it was found that the petitioner had contacted co-accused Sushant @ Badakulu Ladu multiple times whilst he was in Odisha.

13. Mr. Sinha submits that order recording the proceedings under Section 52A of the Act itself records that there is no defect in sampling. Further, the samples were drawn in the presence of the petitioner and his counsel, photography of the inventory has been done and two samples were drawn from each of the five *pulandas* and the petitioner never raised any objection at the time of drawing samples under Section 52A of the Act and cannot raise any objection at this stage.

14. He submits that the arguments raised on behalf of the petitioner in respect of the alleged defect in sampling under Section 52A of the Act is not tenable. He relies upon the judgment of this Court in ***Quentin Decon v. Customs***² to contend that any defect in the procedure adopted for sampling

¹CrI. Appeal No. 909/2005.

²2023 SCC OnLine Del 3329.



of the contraband can enure to the benefit of the petitioner only at the time of the trial and not at the time of considering his bail application.

15. I have heard the learned counsel for the petitioner as well as the Additional Standing Counsel for the State and perused the record.

16. The gravamen of allegations against the petitioner is that he was driving a truck which was found to contain 116.50 Kgs of cannabis (*ganja*) and was arrested in connection with the recovery of said contraband. The main ground urged by the learned counsel for the petitioner is that the drawing of representative samples from the recovered contraband under Section 52A of the Act is defective and this makes the entire recovery, as well as, the case of the prosecution doubtful.

17. Before appreciating the rival contentions of the parties, profitable would it be to refer to Section 52A of the NDPS Act, as well as the law which has been laid by the Hon'ble Supreme Court and by this Court in respect of the procedure of sampling. Section 52A of the Act reads thus:

“52-A. 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, by notification in the official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of 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, numbers 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 of 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.”

18. The Hon’ble Supreme Court in the case of ***State of Punjab v. Balbir Singh***³ in the context of an argument as to the defect in the sampling

³(1994) 3 SCC 299.



procedure so adopted observed that Sections 52 and 57 of the Act contain procedural compliances which are to be adhered to but if there is no strict compliance of the above noted provisions, that by itself cannot render the acts done by the officers of the respondent as null and void, if there is sufficient material against the accused. At the most, a flaw in the sampling procedure may affect the probative value of the evidence. At the same time, the Hon'ble Supreme Court also observed that the provisions are directory in nature, therefore, the Court is bound to examine the prejudice which shall be caused to the petitioner and consequent failure of justice due non-compliance. The relevant paragraph of the judgment of the Supreme Court reads thus:

“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 supplied)

19. Reference may advantageously be had to the observations of a Co-ordinate bench of this Court in ***Bipin Bihari Lenka v. Narcotics Control Bureau***⁴ as well, wherein this Court has held that any prejudice which allegedly has been caused to the accused as a consequence of any defect in the sampling procedure so adopted can be appreciated after the examination of the witnesses. The relevant paragraph of which reads as under:

*“26. The procedure followed in the present case appears to be distinguishable as referred in the typed copy of the complaint annexed with the application. In the present case, total 58 big packets were divided in 11 lots and 48 small packets were divided in 2 lots. Two samples of 25 g each were drawn from each lot (after taking small substance from each packet). Thus, total 26 samples were drawn. I am of the view that at this stage, it may be premature to hold that the procedure adopted for sampling vitiates the entire proceedings since the sampling was done after each of the packets tested positive for ganja. **The prejudice, if any, on account of alleged improper sampling as contended by counsel for the petitioner, can only be appropriately considered after the examination of the witnesses during the course of trial.**”*

(Emphasis supplied).

20. Similarly, this Court in ***Surender Kumar v. Central Bureau of Narcotics***⁵ after referring to the law as laid by the Hon’ble Supreme Court as well as this Court has held that at the stage of considering a bail application especially in cases involving recovery of commercial quantity of

⁴2022 SCC OnLine Del 1160.

⁵2023 SCC OnLine Del 6839.



contraband, any defect in the procedure of sampling adopted will have to be examined considering the nature of violation and consequences thereof. The relevant part of the judgment reads as under:-

“22. This Court also finds able support from order dated 15.03.2023 in BAIL APPLN. 3054/2022 titled Sunny v. State (Govt. of NCT of Delhi), Masibur Khan (supra), order dated 03.08.2022 in BAIL APPLN. 3508/2021 titled Shailender v. State NCT of Delhi and order dated 25.04.2022 in BAIL APPLN. 3291/2021 titled Bipin Bihari Lenka v. Narcotic Control Bureau. Therefore, the argument of the applicant that the trial is vitiated for non-compliance of Section 52A of the NDPS Act, is misplaced.

23. It is also noteworthy that, firstly, Section 52 of the NDPS Act is directory in nature, secondly, non-compliance of the said provision, in itself, cannot render the actions of the Investigating Officers null and void and lastly, whether non-compliance of rules, in cases involving commercial quantity, could be a ground for grant of bail, will have to be examined considering the nature of violation of such standing procedure and consequences thereof. As has already been held by a coordinate Bench of this court in judgment dated 31.05.2023 in BAIL APPLN. 71/2023 titled Quentin Decon v. Customs, wherein it is held as under:

“27. As noted above, the Hon'ble Supreme Court, in Balbir Singh (supra) observed that the provision of Section 52 of the NDPS Act is directory in nature. It was further held that non-compliance of the said provision, in itself, cannot render the actions of the investigating officers as null and void. It would have to be demonstrated that in the facts and circumstances of a particular case, whether such non-compliance caused prejudice to the accused and resulted in failure of justice. It was further held that if there is no proper explanation for non-compliance, then the same will have an effect on the case of the



prosecution and the Courts will have to appreciate the evidence and material placed on record in the case in order to determine the issue. Whether non-compliance of rules could be a ground for grant of bail, especially in cases involving a commercial quantity, where the twin conditions of Section 37 of the NDPS Act would required to be satisfied, will have to be examined considering the nature of violation of such standing procedure and consequences thereof.”

21. The principle which emerges from the above judgments is that the process of sampling has to be in accordance with Section 52A of the NDPS Act. Any deviation so made in the sampling procedure, shall not *ipso facto* lead to grant of bail to the accused. At the same time the officers of the respondent cannot completely violate or ignore the provisions of the Act, the Rules framed thereunder or the standing orders. However, any defect alleged to have occurred in the sampling procedure should be egregious and should *prima facie* cause an irreparable prejudice to the accused.

22. As far as the present case is concerned, it is to be noted that it is not the case of the petitioner that the samples which have been drawn, were drawn from any other *pulandas*. In fact, there is no dispute that the samples which have been drawn have been taken from the same *pulandas* which were recovered from the truck. The mere fact that the proceedings under Section 52A of the Act are silent in respect of the number of brown bundles which were there in each of the *pulandas prima facie* does not cause irreparable prejudice to the petitioner. Further, no objection in this regard has been raised by the petitioner during the process of sampling.



23. The contention of the learned counsel for the petitioner that the recovery of contraband is vitiated on account of non-joining of independent witnesses cannot be sustained. A perusal of the prosecution's FIR reveals that efforts were undertaken to join independent witnesses but they were not willing for the same. It is trite that non-joining of independent witnesses is not fatal to the case of the prosecution. Reference in this regard may be had to the judgment of the Hon'ble Supreme Court in ***Dharampal Singh vs. State of Punjab***, (2010) 9 SCC 608, the relevant paragraph of the judgment reads as under:

“28. The case of the prosecution cannot be rejected only on the ground that independent witnesses have not been examined, in case on appraisal of the evidence on record the court finds the case of the prosecution to be trustworthy. It has come in the evidence of the prosecution witnesses that an attempt was made to join person from public at the time of search but none was available. In the face of it mere absence of independent witness at the time of search and seizure will not render the case of the prosecution unreliable.”

24. In respect of the contention of the learned counsel that the petitioner had no knowledge of the contraband being present in the truck, it is trite that knowledge of possession of contraband has to be gathered from the facts and circumstances of the case. In the present case, it has been stated by the respondent/prosecution in its status report that the present petitioner had contacted the co-accused namely, Sushant @ Badakulu Ladu numerous times *via* telephone, when the petitioner was present in Odisha and he was found driving the vehicle from which contraband was recovered.

25. I have also gone through the judgment of this Court in ***Basant Rai (Supra)*** as relied upon by the learned counsel for the petitioner. The said



judgment was rendered in totally different facts and circumstances at the appellate stage after the testimonies of the witnesses were available to the Court and not at the stage of considering a bail application. Further, in ***Basant Rai (Supra)***, the officials of the respondent therein had mixed the contraband which was recovered from 8 packets and made 2 representative samples of the contraband, whereas that is not the position in the present case as no such mixing has been done. Thus, the said decision is not of any assistance to the petitioner.

26. In view of the aforesaid discussion, at this stage it cannot be said that there are reasonable grounds for believing that the petitioner is not guilty of the offence alleged. Accordingly, the present petitioner, along with pending applications, if any, is dismissed.

27. It is made clear that the observations made herein are only for the purpose of considering the bail application and the same shall not be deemed to an expression of opinion on the merits of the case.

28. The petition stands disposed of.

29. Order *dasti* under the signatures of the Court Master.

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

VIKAS MAHAJAN, J.

APRIL 23, 2024

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