



2024:DHC:7995



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

Date of Decision: October 16, 2024

+ BAIL APPLN. 4225/2023 AND CRL.M.A. 18833/2024

ROHIT KUMAR

.....Petitioner

Through: Mr.Anurag Ahluwalia, Advocate with
Mr. J. P. Singh, Mr. Upendra Yadav,
Mr. Hemant Sharma and Mr. Sahil
Sansanwal, Advs.

versus

THE STATE NCT OF DELHI

.....Respondent

Through: Mr. Aman Usman, APP for the State
with SI Deep Sharma, PS New Delhi
Railway Station.

CORAM:

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

J U D G M E N T

ANOOP KUMAR MENDIRATTA, J.

1. An application under Section 439 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been preferred on behalf of the petitioner for grant of regular bail in FIR No. 22/2020 under Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') registered at P.S.: New Delhi Railway Station. Chargesheet has been filed under Section 20 NDPS Act and Sections 171/465/474 IPC.

2. In brief, as per the case of prosecution, on 24.08.2020 at about 11:35 AM, ASI Bharat/Rly, HC Satyajeet/Rly, HC Vineet/Rly, HC Jaivir/Rly along with Const Rahul/Rly produced the petitioner along with the porter who was carrying the luggage at PS: NDRS. The suitcase trolley had a



number lock while the carry bag had a zip lock and the iron box had two locks placed on it. It was disclosed by the Police Officials from Railway that the petitioner was stopped on suspicion and had failed to produce the keys of the locks for checking. Further, the porter had disclosed that the petitioner had come via Bhuvneshwar Rajdhani train. Petitioner after dillydallying and initially misleading the police officials, shared the password of the lock and produced the keys of the locks and unlocked the same. In total, 18 polythene packets were found in the iron box, 11 in the suitcase and 06 in the trolley/carry bag. The said packets were found to contain *ganja*. Also, notice under Section 50 of NDPS Act was served upon the petitioner. The total weight of the 18 packets in iron box was found to be 37 kgs., out of which two samples of 04 kgs. each were separately taken after mixing the contents from packages. Similarly, 11 packets found in Samsonite suitcase were mixed and weighed 23 kgs., out of which two samples of 04 kgs. each were taken. Further, 06 packets in the carry bag were mixed which weighed 12.5 kgs. and two samples of 04 kgs. each were thereafter taken. As such, the petitioner was found to be in possession of 72.5 kgs. of *ganja*. Also, since petitioner was in possession of two fake RPF ID cards, Sections 171/465/474 IPC were subsequently invoked.

3. (i). Learned counsel for the petitioner submits that search of petitioner had been conducted in violation of Section 50 of NDPS Act since the search was not conducted in presence of gazetted officer. He further submits that there is violation of Section 52A of NDPS Act as well as Standing Orders 1/88 & 1/89 issued in this regard. Specific attention is drawn to paragraphs 2.1, 2.3 and 2.5 of Standing Order 1/89. It is pointed



out that there has been infirmity in drawing the samples since the contents of 18 packets in the iron box were mixed together and thereafter two samples of 04 kgs. each were drawn for the purpose of FSL result. Similar procedure is stated to have been adopted for drawing of samples in respect of 11 packets recovered from the suitcase and 06 packets recovered from carry bag.

(ii). He further emphasises that the contraband was not tested with the field testing kit by the IO and neither the individual packets were weighed for the purpose of inventory to ascertain if the packets were of similar nature.

(iii). It is also pointed out that petitioner is in custody since 24.08.2020 and only 3 witnesses out of 25 have been examined till date. It is urged that the conclusion of trial is likely to take considerable time and petitioner cannot be kept in custody for an infinite period. Reliance is further placed by learned counsel for petitioner on *Amina v. State NCT of Delhi*, 2023 SCC OnLine Del 3491; *Tareena v. State NCT of Delhi*, Bail Appln. 314/2024 decided on 28.02.2024; *Sandeep @ Chiku v. State (NCT of Delhi)*, Bail Appln. 3016/2023 decided on 25.01.2024; *Kashif v. Narcotics Control Bureau*, 2023 SCC OnLine Del 2881; *Rabi Prakash v. State of Odisha*, 2023 SCC OnLine SC 1109; *Mohd. Muslim alias Hussain v. State (NCT of Delhi)*, 2023 SCC OnLine SC 352; *Vishwajeet Singh v. State (NCT of Delhi)*, Bail Appln. 3148/2021 decided on 28.02.2024; *Suraj v. State Govt. of NCT of Delhi*, 2023 SCC OnLine Del 5323; *Praveen Saini v. State of NCT Delhi*, Bail Appln. 2321/2022 decided on 26.07.2023; and *Manish Sisodia v. Directorate of Enforcement*, Criminal Appeal arising out



of SLP (Criminal) No. 8781/2024 decided on 09.08.2024.

4. (i) On the other hand, application is vehemently opposed by learned APP for the State on the ground that *ganja* is identifiable by its smell, texture and physical properties and the mere fact that field testing kit was not used by the Investigating Officer is not fatal to the case of the prosecution. He further emphasises that the judgments relied upon by learned counsel for petitioner have been considered by this Court in ***Shailender v. State NCT of Delhi, Bail Appln.3508/2021***, decided by this Court on **03.08.2022** as well as ***Masibur Khan v. State (Govt. of NCT of Delhi), Bail Appln.2894/2022*** decided by Co-ordinate Bench of this Court on 31.05.2023.

(ii) He further points out that the samples forwarded for FSL examination tested positive for *ganja*. Further, for the sake of argument, even if it is presumed that only one of the packets contained *ganja* and there was mixing of some neutral substance in other packets in the respective containers, the content of one packet from the respective containers would make the recovery as minimum of 06 kgs. (i.e. 2 kgs. x 3).

(iii) Learned APP for the State further contends that there is no violation of Standing Orders 1/88 & 1/89 referred to by the petitioner since threshold limit for the purpose of sample is 25 gms, but there is no bar in case the sample is over and above 25 gms.

(iv) It is further contended that no prejudice can be assumed to the petitioner at this stage since the prosecution needs to be given an opportunity to explain infirmity, if any, in this regard during the course of trial.



(v) Relying upon *Hira Singh v. Union of India*, 2020 20 SCC 272, learned APP for the State further submits that in respect of *ganja*, it cannot be presumed that any neutral substance mixed therein would impact the entire quantity.

(vi) Learned APP also emphasises that there has been no uncalled for adjournment on the part of prosecution and benefit of bail cannot be granted merely on the ground of protraction of proceedings.

Reliance is further placed upon *Masibur Khan v. State (Govt of NCT of Delhi)*, Bail Appln.2894/2022 decided on 31.05.2023; *Ranjan Kumar Chadha v. State of Himachal Pradesh*, 2023 SCC OnLine SC1262; *Bipin Bihari Lenka v. Narcotic Control Bureau*, Bail Appln. 3291/2021 decided on 25.04.2022; *Arvind Yadav in JC Through His Pairokar v. Govt. Of NCT of Delhi through Standing Counsel*, 2021 SCC OnLine Del 3619; *Quentin Decon v. Customs*, 2023 SCC OnLine Del 3329.

5. In rebuttal, learned counsel for the petitioner emphasises that there was no restraint on the part of police to adopt the procedure under Section 52A of NDPS Act since the concerned bags were opened in the police station itself. Reliance in this regard is placed upon *Amina v. State NCT of Delhi* (supra) and *Tareena v. State NCT of Delhi* (supra).

6. I have given considered thought to the contentions raised.

Admittedly, as per the case of the prosecution, petitioner was stopped at Railway Platform on suspicion, since the luggage which also consisted of an iron box carried by the porter did not bear any particulars, and was similar to as is carried by the security personnel. The porter on inquiry had informed the petitioner to be the owner of the said luggage and had de-



boarded from Bhuvneshwar Rajdhani Train. Petitioner was accordingly brought at the Police Station since he dillydallied to provide the keys of the lock. The commercial quantity of *charas* (contraband) as already described was recovered from the iron box, suitcase and carry bag, as detailed above.

7. The primary contention on behalf of the petitioner is that the rigours of Section 37 NDPS Act are not attracted, since the sampling has not been done as per the established procedure and also there is delay in filing an application under Section 52A of NDPS Act before the learned Magistrate.

Relying upon *Union of India v. Mohan Lal & Anr.*, (2016) 3 SCC 379 and referring to standard procedure stipulated in Standing Order No.1/89 dated 13.06.1989, it has been pressed by learned counsel for the petitioner that non-compliance of Section 52A of NDPS Act is fatal to the prosecution.

Petitioner challenges the non-compliance of standard procedure provided in paragraphs 1.6 and 1.7A of the Standing Order No.1/88 which provides for drawing a sample in duplicate from each package/container in case of seizure of more than one packet or container. The case of the petitioner is that sample ought to have been taken from each of the respective packets alleged to have been found in respective three bags instead of the procedure adopted by the Investigating Agency of drawing the sample after mixing of the packets in each respective bag. The provisions in Standing Order No.1/89 in this regard are also stated to be *pari materia* with the Standing Order No.1/88 with some additional modifications.

8. Scope of Section 52A of NDPS Act was considered in *Mangilal v. State of M.P.*, 2023 INSC 549, wherein it was observed by the Hon'ble



Apex Court that sub-section (1) of Section 52A of NDPS Act facilitates the Central Government to prescribe a mode to dispose the seized narcotic substance. The idea is to create a clear mechanism for such disposal both for the purpose of dealing with the particular case and to safeguard the contraband being used for any illegal purpose thereafter. Further, the objective behind sub-section (2) of Section 52A of NDPS Act is to have an element of supervision by the Magistrate over the disposal of seized contraband. The certifying of correctness of inventory, taking photographs and list of samples drawn with certification by Magistrate would constitute as **primary evidence**.

In view of above, the provisions of Section 52A of NDPS Act need to be complied with before disposal/destruction of the contraband and the nature and authenticity of the contraband which is the subject matter of the trial can be proved by way of producing the certificate given by the Magistrate and is treated as primary evidence. However, the delay in moving an application under Section 52A of NDPS Act does not itself vitiate the trial. An opportunity needs to be given to the prosecution to explain/justify the delay in moving an application under Section 52A of NDPS Act. The prejudice, if any, to the accused needs to be proved during the course of trial as to why the prosecution did not seek to destroy the contraband or legitimise the inventory by preferring an application under Section 52A of NDPS Act within time.

It may also be observed that the seized contraband may be proved by producing the same during the course of trial which shall constitute the primary evidence or the same may be done by way of certificate issued



under Section 52A of NDPS Act by the concerned Magistrate, in case the contraband is destroyed. Mere delay in following the procedure under Section 52A of NDPS Act, does not enable this Court to overcome the rigours of Section 37A since the seizure of contraband in the present case was a chance recovery after the petitioner de-boarded the train. Also, it cannot be ignored that there is nothing on record to suggest that original contraband seized is unavailable during the course of trial. The cause of delay can be duly explained by the prosecution during the course of trial. The departure in following Standing Order No.1/88 or 1/89 for sending the samples to FSL cannot lead to vitiation of trial since no such provision is made under Section 52A of NDPS Act. The mere delay cannot be an automatic ground for bail in absence of some *prima facie* evidence to show the prejudice on account of delay. Moreso, since the contraband consisting of *ganja* is identifiable by physical characteristics and there is nothing on record to show if the case property was tampered. The case is also supported by CCTV footage collected from Railway Platform and rules out false implication of the petitioner.

9. This Court has observed in *Shailender v. State of NCT of Delhi, Bail Appln.3508/2021* decided on 03.08.2022 that procedural lapses have to be determined during the course of trial and the prejudice caused by the non-compliance has to be shown by the accused. Relevant observations in para 8 in this regard may be reproduced for reference:

“8. It may be observed that the proposition of sending entire quantity seized for chemical analysis may not be practicable in several cases. The drug peddlers and suppliers appear to be adopting the unique and novel methodology to escape law, by carrying large number of smaller packets which later on, is challenged on the ground



of improper sampling during investigation. In Gaunter Edwin Kircher vs. State of Goa, it was prima facie established by the accused that the recovered substance consisted two separate forms but only a part of the same which was a flat substance and not in the form of cigars was forwarded. As such, benefit was extended at the stage of appeal since no finding could be given that other part of the alleged recovered substance, which was not forwarded for examination could be presumed to be a narcotic substance. However, the factual position in the present case is distinct. Though the burden always remains on the prosecution to prove that the quantity possessed by accused was heroin, beyond reasonable doubt but it cannot be ignored that the petitioner is yet to come up with any explanation during trial as to what was allegedly contained in the similarly packed smaller packets which on preliminary testing by the Investigating Agency tested positive for heroin. Prima facie the substance recovered in different packets was of similar texture, colour and tested positive on field testing. The circumstances under which the sampling procedure could not be followed as per the mandate, needs to be duly considered after the evidence has been led on record and the FSL expert is examined. Considering the limitations for grant of bail referred in Section 37(1)(b)(ii) for offences punishable under Sections 19, 24 or 27A and also for offences involving a commercial quantity, there must exist 'reasonable grounds to believe' at this stage that the person is not guilty of such an offence. In my considered opinion, there does not exist reasonable grounds at this stage to give a finding that the entire proceedings stand vitiated because of the alleged sampling procedure adopted by the Investigating Agency. The procedural deficiency in sampling, as contended by learned counsel for the petitioner, can be considered only after the evidence is led on record. The observations of learned Trial Court in order dated 07.09.2021 are also relevant in this regard.

".....Even if for the sake of arguments, it is presumed that accused/applicant is liable for possession of one packet only, even then accused/applicant is not entitled to bail as a matter of right. 200 grams of heroin is more than small quantity but less than commercial quantity. The facts and circumstances of the present case are very different from the facts and circumstances of the cases upon which reliance has been placed by Ld. Counsel for accused/applicant. The other contentions raised by Ld. Counsel for accused/applicant are a matter of trial....."

For the foregoing reasons, no grounds for bail are made out, at this stage.

The application is accordingly dismissed."



10. Reliance may also be placed upon *State of Punjab v. Balbir Singh*, (1994) 3 SCC 299, *Arvind Yadav in JC through his Pairokar v. Govt. of NCT of Delhi* (supra).

11. A similar issue in this regard also came up for consideration in *Masibur Khan v. State Govt. of NCT of Delhi* (supra), wherein 09 bags containing 04 packets each (36 packets of 05 kgs. each) of *ganja* were recovered. A sample in respect of recovery from each bag was drawn after homogenously mixing the four packets in each bag. The aforesaid sampling was challenged as defective being in violation of Standing Order 1/88 & 1/89 referred to above. The observations made by Hon'ble Single Judge in paras 35 to 37 after taking notice of most of the authorities including *Shailender v. State of NCT of Delhi* (supra) may be beneficially noticed:

“35. In view of the aforesaid, this Court is of the opinion that the procedure adopted with respect to contraband in the present case is not defective in nature, at this stage. The applicant will get ample opportunity to prove that the said recovery was defective and samples drawn were not the true representatives of the contraband recovered, during the course of trial before learned Special Judge. It is pertinent to note that, the said standing orders cannot be exhaustive enough to cover all factual scenarios at the time of seizure of the contraband. Various factors like nature of contraband seized, the volume/quantity of the seizure, place of seizure, time of seizure, etc. will be relevant to determine any non-compliance thereof and effect of such noncompliance.

36. Hon'ble Supreme Court in *Balbir Singh* (supra) observed that the Investigating Officer is bound by the procedural instructions and has to follow the same, and in case of non-compliance thereof, and if no proper explanation is forthcoming, then the same would have adverse impact on the prosecution's case. It was further noted in the said judgment that the Courts would appreciate the evidence and merits of the case keeping these aspects in view. In the opinion of this Court, whether the sample drawn would be a true representative sample of the contraband recovered, can be answered by the chemical analyst, who analyses the sample and gives his/her opinion. Learned Special



Judge during the course of the trial will have the advantage of the testimony of the chemical analyst as well as the production of contraband seized in the Court. It is pertinent to note that the case property is still there for any further analysis if so required. Therefore, it is premature at this stage to say that the sample drawn are not true representative samples of the contraband seized. In the present case, at the time of examination of case property, the learned Special Judge can satisfy himself with regard to the correctness of the procedure followed.

37. In view of the aforesaid position and circumstances, the present application is dismissed and disposed of accordingly.”

12. It may also be relevant to notice that in ***Saddad Alam v. State (Govt. of NCT of Delhi)***, **Bail Appln. 2475/2023**, commercial quantity of *ganja* i.e. 20.80 kgs. was recovered from the petitioner and proceedings were similarly challenged on the ground of procedural lapse in drawing of samples which had been drawn after mixing of contents of the respective packets. Relying upon ***Masibur Khan v. State (Govt. of NCT of Delhi)*** (supra) and other judgments, it was held by the Co-ordinate Bench of this Court that validity of proceedings under Section 52A of NDPS Act cannot be examined at the stage of consideration of bail and the application for bail was accordingly dismissed. The order passed in the aforesaid case was not interfered with by the Hon’ble Supreme Court in Special Leave to Appeal (Crl.) No.15127/2023 decided on 28.11.2023.

13. Considering the facts and circumstances of the case, benefit to the petitioner on the grounds of improper sampling cannot be examined at the stage of bail, since the recovered contraband i.e. *ganja* is identifiable by mere physical characteristics and it may be difficult to conclude that the petitioner has crossed the threshold under Section 37 of NDPS Act.

14. Prolonged custody and delay in trial



Learned counsel for the petitioner has also vehemently contended that petitioner is incarcerated since 24.08.2020 and only three witnesses have been examined so far. He submits that 25 witnesses have been cited by the prosecution, which is likely to take considerable time, and undue delay in trial is unfettered by the rigours of Section 37 of NDPS Act, in cases of prolonged custody.

15. Hon'ble Apex Court in *Ankur Chaudhary v. State of Madhya Pradesh*, SLP (Crl.) 4648/2024 decided on 28.05.2024 observed that failure to conclude the trial within a reasonable time resulting in prolonged incarceration militates against the precious fundamental right guaranteed under Article 21 of the Constitution of India and as such conditional liberty overriding the statutory embargo created under Section 37(1)(b) of NDPS Act may in such circumstances be considered. There have been several decisions by the Co-ordinate Benches of this Court wherein benefit of bail for prolonged custody has been granted wherein the contraband consisted of *ganja*. Reference in this regard may be made to *Ramesh Kumar v. D.R.I.*, 2024 SCC OnLine Del 5304, wherein accused involved in recovery of 457 kgs. of *ganja* was admitted to bail considering that he had been in custody for period of about three and a half years. Also, in *Gopal Dangi v. State NCT of Delhi*, 2024 SCC OnLine Del 4825, the benefit was extended in case of recovery of 259.607 kgs. of *ganja* wherein only one witness had been examined and the petitioner remained in custody for about two years. The aforesaid orders have been passed relying upon *Gurpreet Singh v. State of NCT of Delhi*, 2024 SCC OnLine Del 696, wherein bail was granted by the Hon'ble Apex Court in a case involving recovery of 26.79 kgs. of *ganja*,



since only two witnesses had been examined despite the accused being in custody for a period of three and a half years. Benefit of bail on account of prolonged trial was also granted in *Sovraj v. State Govt. of NCT of Delhi*, **Bail Appln. 2537/2023** decided on 08.07.2024 by the Co-ordinate Bench of this Court, wherein the accused had been in custody since 18.02.2021.

16. In the present case, only three witnesses are stated to have been examined till date, despite the fact that accused is in custody since 24.08.2020. Since it is settled that Section 37 of NDPS Act does not preclude the grant of bail on the grounds of undue delay in concluding the trial, this Court is of the considered opinion that the petitioner cannot be made to undergo the entire period in custody when *prima facie*, the conclusion of trial is likely to take a considerable time.

Petitioner is accordingly directed to be released on bail on furnishing a personal bond in the sum of Rs.1,00,000/- (Rupees One Lakh Only) with two sureties in the like amount to the satisfaction of the learned Trial Court and subject to following conditions:

1. Petitioner upon release shall share his mobile number with IO/SHO concerned and shall keep the same switched on at all times;
2. Petitioner shall appear before the learned Trial Court on each date of hearing and shall not influence the witnesses in any manner; and
3. Petitioner shall surrender his passport, if any, with the Investigating Agency.



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Application is accordingly allowed. Pending applications, if any, also stand disposed of.

A copy of this order be forwarded to Jail Superintendent as well as learned Trial Court for information and compliance.

(ANOOP KUMAR MENDIRATTA)
JUDGE

OCTOBER 16, 2024/R/sd