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

Judgment reserved on: 19.12.2024

Judgment pronounced on: 22 .01.2025

+ **BAIL APPLN. 3710/2023**

SANJAY

.....Petitioner

Through: Ms Sushma Sharma, Mr Girish
Kumar Sharma, Mr Dhruv Kumar Sharma,
Ms Aayushi Gaur, Ms Stuti Aggarwal and
Mr Sahil, Advs.

versus

THE STATE NCT OF DELHI

.....Respondent

Through: Mr Aman Usman, APP for State
with SI Satnarayan, ANS/SED

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, J**

1. This is a petition filed under section 439 of Code of Criminal Procedure ("**CrPC**") seeking regular bail in FIR bearing No. 788/22 dated 06.11.2022 under section 21 of Narcotic Drugs and Psychotropic Substances Act, 1985 ("**NDPS Act**") PS Okhla Industrial Area, South-East, New Delhi.

FACTUAL MATRIX

2. As per the prosecution, a secret information was received on 06.11.2022 at around 08:00 AM that one person i.e. the petitioner herein would come to Okhla Industrial Area at around 12:00 PM to



supply smack/heroine, if a raid is conducted then he can be apprehended with the contraband. After the verifying the secret information, SI passed the information to Inspector Rajinder Singh IUC Anti-Narcotic Squad and ACP/Operation Sh Satpal Panwar over telephone. On the directions of the ACP, the SI recorded the said information in DD No. 3 at 9:20 AM. A raiding team was constituted, and it took position near Okhla Phase-2 at around 10:45 AM. The SI introduced the raiding team to 4-5 passers-by requesting them to join as independent witnesses, but all of them denied citing justified compulsion.

3. It is further stated that at around 11:35 AM, a person wearing grey colored jeans and light pink colored t-shirt (identified by the secret informer) was apprehended and upon strict interrogation the name of the person apprehended was found to be Sanjay s/o Kailash r/o jhuggi no. D-240, Block A, J.J Camp, Okhla Industrial Area, Phase – 2, Delhi, Aged – 24 years (the petitioner herein). The passers-by who gathered there were informed about the information and asked to join the investigation, refused to join the same by citing their own justified compulsions. The SI then informed Inspector Rajender Singh over phone about the apprehended person, who spoke to ACP/OPS and ordered to take appropriate action. Thereafter, the petitioner was apprised about the secret information and was told about his personal search.
4. Accordingly, a notice under section 50 of NDPS Act was prepared and read out and explained to the petitioner and was served upon him. On a cursory search of the petitioner, a red colored carry bag was



recovered from the right pocket of his jeans in which a transparent polythene was found. After opening and checking the same with the help of field-testing kit, smack/heroine was recovered. The weight of the recovered smack/heroine with the said polythene was found to be 270 grams which is above the commercial quantity i.e. 250 grams and thereafter, the said polythene along with the contraband was seized. Hence the FIR.

5. The petitioner was arrested on 06.11.2022.
6. After completion of the investigation, the chargesheet was filed against the petitioner under section 21 of NDPS Act before the concerned Court.
7. The petitioner filed the bail application before the learned Trial Court which was dismissed *vide* order dated 17.10.2023. Hence the present petition.

SUBMISSIONS ON BEHALF OF THE PETITIONER

8. Learned counsel for the petitioner states that in the present case, there is non-compliance of Section 52A of NDPS Act as the inventory of the contraband was not prepared and neither the same was produced before the Ld. MM while conducting the proceedings under Section 52A of NDPS Act. Therefore, there is no inventorisation/certification signed by the Ld. MM. Hence, there is no proof that the contraband seized from the petitioner was the same as was produced before the Ld. MM for taking the samples. Reliance is placed on *Mohit Bhati v. State of NCT of Delhi, Bail Appln No. 1853/2024 decided on 01/08/2024* to urge that bail should be granted due to non inventorisation of the contraband.



9. It is further submitted that there is non compliance of section 50 of NDPS Act as in the notice, it is mentioned as ‘any’ magistrate instead of ‘nearest’ magistrate. Reliance is placed on *Mohd. Jabir v. State (NCT of Delhi), 2023 SCC OnLine Del 1827* and *Aabid Khan v. State (NCT of Delhi), 2023 SCC OnLine Del 7668*.
10. Learned counsel for the petitioner further submits that no videography or photography was done at the spot and no public witness joined the proceedings. Reliance is placed on *Sukhvinder Singh v. State (NCT of Delhi), 2024 SCC OnLine Del 4733* and *Madhuri Chauhan v. State (NCT of Delhi), 2024 SCC OnLine Del 4735*.
11. Lastly, it is submitted that there is delay in trial as not even a single witness has been examined till yet and the trial is not likely to be concluded in near future. Further, the petitioner has undergone almost 2 years of incarceration.

SUBMISSIONS ON BEHALF OF STATE

12. It is argued by the learned APP that NDPS Act is a special statute with an overriding effect over CrPC. Sections 41, 42 and 43 of NDPS Act provides for warrants, search, arrest and seizure. These have an overriding effect over corresponding sections of CrPC. Section 51 of NDPS Act clarifies that the provisions of CrPC apply only to the extent they are not inconsistent with the NDPS Act. Therefore, the provisions of the NDPS Act take precedence over the general provisions of the CrPC, particularly concerning the procedure for search, seizure, and arrest.
13. It is contended by the learned APP that the provisions of Section 50 of NDPS Act are mandatory in nature, however, there is an exception i.e.



Section 50(5), which allows a duly authorized officer to conduct a search without taking the person to be searched to a Gazetted officer or Magistrate if it is not feasible to do so. Section 50(5) of NDPS Act must be read in harmony with the other sub-sections of Section 50. Section 100 CrPC applies in the event the investigating officer is unable to take the accused to a Gazetted officer or Magistrates due to circumstances. It is not mandated that the provisions of Section 100 CrPC, would also apply upon refusal by the accused to exercise the option provided under Section 50(1) of the NDPS Act. The provisions of Section 100(4) are not mandatory in nature and even if there is non-compliance, the recovery may still be valid if it constitutes an offense under the NDPS Act.

14. He further states that non-joining of independent witnesses despite the best efforts by the IO, does not automatically vitiate the proceedings. The recovery effected in the presence of police officials cannot be doubted and the recovery is a subject matter of Trial. Reliance is placed on *Kallu Khan v. State of Rajasthan*, (2021) 19 SCC 197, *Jagwinder Singh v. State of Punjab*, Crl. Appl. No. 2027/2012 dated 02.11.2023 and *Ram Swaroop v. State (Govt. of NCT of Delhi)*, (2013) 14 SCC 235.
15. He further states that the police in performing their official duties, act under the presumption of regularity. There is a presumption in favour the police in discharge of their official duties unless contrary evidence is produced. Reliance is placed on *Surinder Kumar v. State of Punjab*, (2020) 2 SCC 563.
16. The argument pertaining failure of the IO to record the raid via



photography or videography is impractical. Practical difficulties during investigation often limit the IO to record every raid. Reliance is placed on *Chidi Berr Nwayoga v. State, 2022 SCC OnLine Del 2558*.

17. Lastly, it is stated that delay in trial cannot be attributed to prosecution. It is contended by the learned APP that the delays in the trial are due to presiding officer being on leave. Reliance is placed on *Mohd Akhtar v. State (NCT of Delhi), 2022 SCC OnLine Del 3210*.

ANALYSIS AND FINDINGS

18. I have heard learned counsels for the parties and perused the material available on record.

19. Learned counsel for the petitioner has sought bail on the following grounds:-

- A. Non-compliance of Section 52A;
- B. Non compliance of Section 50;
- C. Non joinder of independent witnesses;
- D. No videography and photography of the seizure; and
- E. Delay in trial.

Non compliance of Section 52A

20. Sub section (2) (3) and (4) of Section 52A of NDPS Act read as under:-

[52A. Disposal of seized narcotic drugs and psychotropic substances.—

(1)

(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 1972) 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.]

21. On perusal, whenever any narcotic drugs, psychotropic substances, controlled substances or conveyances have been seized and thereafter forwarded to the police or to the officer empowered under section 53, the officer referred to in subsection (1) ‘shall’ prepare an inventory containing all the details such as quality, quantity, mode of packing, numbering and identifying marks etc. followed by an application to any Magistrate for certifying the correctness of the inventory and to allow to draw samples from such drugs or substance in the presence of the Magistrate and to certify the correctness of the list of samples so drawn. Sub section (4) further states that the inventory, the photographs and list of samples drawn and certified by the Magistrate shall be treated as primary evidence in respect of such offences.

22. It is apposite to refer to the judgment of *Yusuf v. State, 2023 SCC OnLine SC 1328* wherein the Hon’ble Supreme Court observed as under:-

“13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under sub-sections (2), (3) and (4) of Section



52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of sub-section (2) of Section 52A of the NDPS Act.

14. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not in the presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or of the list of samples so drawn.

15. In Mohanlal's case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary



evidence for the purposes of the trial.

16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.”

(Emphasis added)

- 23.** The Hon’ble Supreme Court was of the view that in the absence of inventorisation of the seized contraband, the said contraband will not be treated as a valid piece of primary evidence in the trial and hence, the trial will be vitiated.
- 24.** In the present case, on perusing the chargesheet, there is no mention of the inventory so prepared of the seized contraband. Moreover, during the sampling process before the Ld. MM, the order dated 09.11.2022 does not reflect that the inventory, if so was prepared, was certified by the Ld. MM. The operative portion of the order dated 09.11.2022 read as under:-

“By way of this application, the IO seeks permission for drawing the sample of case property recovered during the investigation. MHCM has produced the case property i.e. one plastic transparent box which is mark A containing the contra band duly sealed with the seal H.S and A.K. The details of case, signatures of first IO as well as witnesses,



accused persons and SHO, OIA are also there on the Doctor tape covering the plastic box. At the stage, SI Atul Yadav has produced before me a photographer HC Binod, No. 1376/SE and he has taken the photographs of sealed Box A.

At this stage, SI Atul Yadav is directed to upon transparent plastic box A by breaking the seal and to take out samples from the said transparent plastic box.

At this stage, IO/SI Atul Yadav has produced before me a weighing machine and same is calibrated to zero (0) value. SI Atul Yadav has taken out the contraband from the transparent plastic box mark A and putted on the weighing machine and its weight is noted to be 270 gram.

Out of the total contraband produced before the undersigned, IO/SI Atul Yadav has taken two samples of 10 grams each in transparent poly bags and put the same in two transparent plastic boxes, covered with Doctor tape which are now marked as S1 and S2. The weight of the plastic boxes in which the sample is stored is 20 grams.....”

- 25.** The above order does not mention that any inventory was prepared in accordance with Section 52A (2) of NDPS Act.
- 26.** Perusal of the order 09.11.2022 reproduced above, I am of the view that the inventory of the alleged seized contraband was not prepared and hence the question of certifying the correctness of the inventory before the Magistrate did not arise. The Ld. MM, in the present case,



has only certified the samples drawn from the alleged seized contraband but the inventory is missing.

27. A coordinate bench of this Court has also endorsed the same view in, *inter alia*, ***Mohit Bhati (supra)*** and ***Yashmin vs. State, Bail Appln No. 886/2024 decided on 27/08/2024*** and has released the petitioner therein on bail.

28. At this juncture, it is noteworthy to mention the recent judgment passed by the Hon'ble Supreme Court i.e. ***Narcotics Control Bureau v. Kashif, 2024 SCC OnLine SC 3848*** wherein the law with regard to section 52A has been discussed and observed as under:-

“39. The upshot of the above discussion may be summarized as under:

(i) The provisions of NDPS Act are required to be interpreted keeping in mind the scheme, object and purpose of the Act; as also the impact on the society as a whole. It has to be interpreted literally and not liberally, which may ultimately frustrate the object, purpose and Preamble of the Act.

(ii) While considering the application for bail, the Court must bear in mind the provisions of Section 37 of the NDPS Act which are mandatory in nature. Recording of findings as mandated in Section 37 is sine qua non is known for granting bail to the accused involved in the offences under the NDPS Act.

(iii) The purpose of insertion of Section 52A laying down the procedure for disposal of seized Narcotic Drugs and



Psychotropic Substances, was to ensure the early disposal of the seized contraband drugs and substances. It was inserted in 1989 as one of the measures to implement and to give effect to the International Conventions on the Narcotic drugs and psychotropic substances.

(iv) Sub-section (2) of Section 52A lays down the procedure as contemplated in sub-section (1) thereof, and any lapse or delayed compliance thereof would be merely a procedural irregularity which would neither entitle the accused to be released on bail nor would vitiate the trial on that ground alone.

(v) Any procedural irregularity or illegality found to have been committed in conducting the search and seizure during the course of investigation or thereafter, would by itself not make the entire evidence collected during the course of investigation, inadmissible. The Court would have to consider all the circumstances and find out whether any serious prejudice has been caused to the accused.

(vi) Any lapse or delay in compliance of Section 52A by itself would neither vitiate the trial nor would entitle the accused to be released on bail. The Court will have to consider other circumstances and the other primary evidence collected during the course of investigation, as also the statutory presumption permissible under Section 54 of the NDPS Act.”

(Emphasis added)



29. The Hon'ble Supreme Court in *Yusuf (supra)* has held that the non compliance of section 52A of NDPS Act would vitiate the trial, however, recently, the Hon'ble Supreme Court in *Kashif (supra)* while distinguishing *Yusuf (Supra)* observed that any procedural lapse or delayed compliance of Section 52A(2) of NDPS Act would be a procedural irregularity which will not vitiate the trial and entitle the accused to be released on bail 'on this ground alone'. The Court has to consider all the circumstances and other primary evidence and come to a finding as to whether serious prejudice has been caused to the accused.

30. Similar view has been reiterated again by the Hon'ble Supreme Court in *Bharat Aambale v. The State of Chhattisgarh, 2025 INSC 78* wherein it is observed as under:-

"50. We summarize our final conclusion as under: -

.....

(V) Mere non-compliance of the procedure under Section 52A or the Standing Order(s) / Rules thereunder will not be fatal to the trial unless there are discrepancies in the physical evidence rendering the prosecution's case doubtful, which may not have been there had such compliance been done. Courts should take a holistic and cumulative view of the discrepancies that may exist in the evidence adduced by the prosecution and appreciate the same more carefully keeping in mind the procedural lapses.

.....

(VII) Non-compliance or delayed compliance of the said



provision or rules thereunder may lead the court to drawing an adverse inference against the prosecution, however no hard and fast rule can be laid down as to when such inference may be drawn, and it would all depend on the peculiar facts and circumstances of each case.”

31. I am of the view that in the present case, there is non compliance of section 52A as inventory is not prepared which is a procedural irregularity but this ground alone will not entitle the petitioner to grant bail. Having said that, the other submissions of the learned counsel for the petitioner are being dealt as under:-

Non compliance of section 50

32. Learned counsel for the petitioner has further contended that the notice given under section 50 of NDPS Act does not comply with the requisite condition as mentioned therein, the word ‘any’ Magistrate has been mentioned instead of ‘nearest’ Magistrate.

33. The said defence is no longer available to the accused as the Hon’ble Supreme Court, recently, in ***State of NCT of Delhi v. Mohd. Jabir, Criminal Appeal No. 4931 of 2024*** has observed as under:-

“.....The provision vide sub-section (1) mandates that when an officer duly authorized under Section 42 is about to search a person under the provisions of Sections 41, 42 or 43, he shall, if the person about to be searched so requires, take the person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.
It is obvious that the intent behind the provision is to ensure



that the person about to be searched is made aware of the option to be taken before a third person other than the one who is conducting the search. Use of the expression “nearest” refers to the convenience as the suspect is to be searched. Delay should be avoided, as is reflected from the use of the word “unnecessary delay” and the exception carved in sub-section (5) to Section 50 of the NDPS Act. Nothing more is articulated and meant by the words used, or the intent behind the provision.

Having said so, we are unable to appreciate the reasoning given by the High Court in the impugned judgment, which states that use of the word ‘any’ does not satisfy the mandate of the ‘nearest’ Gazetted Officer and, hence, the respondent, Mohd. Jabir, is entitled to bail. The option given to the respondent, Mohd. Jabir, about to be searched, with reference to a Gazetted Officer or a Magistrate, does not refer to the authorized person in the raiding team itself. It is pertinent to mention that the respondent, Mohd. Jabir, did not exercise the option.

The aforesaid ratio is not in conflict with the decision of this Court in Arif Khan alias Agha Khan v. State of Uttarakhand, wherein this Court has observed that requirements of Section 50 of the NDPS Act are mandatory and must be strictly complied with. Section 50 casts an obligation on the police officer to apprise the person intended to be searched that under Section 50, he is



required to be searched only before a Gazetted Officer or a Magistrate. The requirement is that the authorized officer must make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate.....”

(Emphasis added)

- 34.** The Hon’ble Supreme Court has held that the word ‘any’ instead of ‘nearest’ does not negate the effect and intent of notice given under section 50 of NDPS Act. Further, the accused or to whom the notice is served, shall be informed about the right that he is to be searched only before a nearest Gazetted Officer or a Magistrate for the purpose of search. The said requirement is an obligation on the police officer to inform the accused for the compliance of section 50 of NDPS Act.
- 35.** In this backdrop, this Court has to be satisfied whether the petitioner was informed about his right.
- 36.** In the present case, notice given to the petitioner under section 50 of NDPS Act reads as under:-

“.....You are informed through this notice that we have information that you deal in SMACK / HEROIN supply and at this time also illegitimate SMACK / HEROIN may be recovered from your possession, therefore your search should be carried out by the police officer. Before you being searched it is your legal right that you can get yourself searched in front of any Gazetted Officer or Magistrate who can be called on the spot and before your search, you can also search the members of the Police Personnel.

.....



I sanjay studied till 5th class and I am well known about my legal rights. I do not want to get searched in front of any gazzetted officer or magistrate and also do not want to search any police officials. You can search me.....”

37. On perusal, the aforesaid content of the notice clearly shows that the petitioner was duly informed about his right to get searched in the presence of a Gazetted Officer or Magistrate. The petitioner did not exercise that option. The duty cast upon the officer has been duly discharged by the said officer. The petitioner was duly informed about his right and the petitioner chose not to exercise the same. Therefore, I am of the view that the requisite conditions of section 50 of NDPS Act have been complied with.

Non joinder of independent witness

38. Further, as argued by the learned counsel for the petitioner, there has been no public witness who has joined the recovery proceedings. It is important to note that the recovery, in the present case, was done at around 11:35 AM near Okhla Phase-2 meaning thereby in broad daylight at a public place.

39. It is stated by the learned APP that section 100 of CrPC comes into the picture, when the officer is of the view that it is not feasible to take the accused to the nearest Gazetted Officer or Magistrate due to circumstances. Further, even if there is non compliance of section 100 (4) of CrPC, it will still be an offence under NDPS Act. The absence of independent witness may raise concerns about the credibility of an evidence but such irregularity will not vitiate the trial.

40. No doubt, section 50(5) of NDPS Act permits the officer to do away



with taking the accused to the nearest Gazetted Officer or Magistrate provided that the officer is of the view that taking the accused to the nearest Gazetted Officer or Magistrate would result in possibility of the accused parting with the contraband. If the officer is of the said view, then the officer has to conduct search under the provisions of section 100 of CrPC. For the sake of perusal, section 50 (5) of NDPS Act reads as under:-

“Section 50. Conditions under which search of persons shall be conducted.-

.....

[(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).”

41. Section 100 (4) of CrPC states that whenever the officer or any other authorized persons is conducting search, shall call upon two or three independent and respectable inhabitants from the locality where the search is conducted and such search be conducted in their presence. The said section reads as under:-

“(4) Before making a search under this Chapter, the officer



or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.”

42. The Hon’ble Supreme Court in *State of Punjab v. Balbir Singh, (1994) 3 SCC 299* observed that the violation of *inter alia*, section 100 does not vitiate the case of the prosecution. Further, if there is such violation, what the courts have to see is whether any prejudice was caused to the accused and in appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and from that point of view evaluate the evidence on record. In addition, when such provisions have not been complied with, it may, however, affect the weight of the evidence in support of the search or may furnish a reason for disbelieving the evidence produced by the prosecution unless the prosecution properly explains such circumstance which made it impossible for it to comply with these provisions. Para 7 of the said judgment is extracted below:-

“7. It therefore emerges that non-compliance of these provisions i.e. Sections 100 and 165 CrPC would amount to an irregularity and the effect of the same on the main case depends upon the facts and circumstances of each case. Of course, in such a situation, the court has to consider whether any prejudice has been caused to the accused and



also examine the evidence in respect of search in the light of the fact that these provisions have not been complied with and further consider whether the weight of evidence is in any manner affected because of the non-compliance. It is well settled that the testimony of a witness is not to be doubted or discarded merely on the ground that he happens to be an official but as a rule of caution and depending upon the circumstances of the case, the courts look for independent corroboration. This again depends on question whether the official has deliberately failed to comply with these provisions or failure was due to lack of time and opportunity to associate some independent witnesses with the search and strictly comply with these provisions.....”

- 43.** The Hon’ble Supreme Court in ***Kishan Chand v. State of Haryana, (2013) 2 SCC 502*** has observed that lack of independent witness in the recovery or in the entire investigation process casts a shadow of doubt over the case of the prosecution.
- 44.** A Coordinate Bench of this Court in ***Krishan v. State (NCT of Delhi), 2023 SCC OnLine Del 8646*** has observed that absence of independent witnesses is a relevant factor for granting bail to an accused person, specially, when the recovery is effectuated from public space in broad daylight.
- 45.** In the present case, a secret information was received at around 9 AM that one person at 12 PM is going to supply smack/heroin. Upon this, a raiding team was constituted and reached the spot at 10:20 AM. The petitioner was apprehended at around 11:35 AM. It appears that the



raiding team successfully reached the spot before the given time when the suspected person was to come. There was ample time for the prosecution to secure independent witness/es from such crowded place as in the present case, the recovery was made from Okhla Phase-2 during broad daylight. It is mentioned in the chargesheet that 4-5 passers-by were asked to join but they refused to join by citing their own justified compulsion.

46. As noted above, absence of independent witness may not vitiate the trial, however, it is open for the prosecution to explain the said absence. With regard to whether prejudice has been caused to the petitioner herein, *prima facie*, I am of the view that, while considering the bail application, benefit must be extended to the petitioner as in the chargesheet, only a bald averment is made that 4-5 passers-by were asked to join but they refused citing their justified compulsions. The said refusal must be recorded in writing and signed by such person which is not done in the present case. In addition, the chargesheet is also devoid of any averment that if any notice under section 100 (8) of CrPC was given to the passers-by and also no efforts were made to note down the details of such passers-by.

No photography and videography

47. Learned counsel for the petitioner has also stated that the police official did not arrange any videography and photography of the recovery of the contraband from the petitioner.
48. The Hon'ble Supreme Court in *Shafhi Mohd. v. State of H.P., (2018) 5 SCC 311* has expressed the need for videography and photography during the investigation. Relevant para from the said judgment is



extracted below:-

“10. Thus, we are of the considered view that notwithstanding the fact that as of now investigating agencies in India are not fully equipped and prepared for the use of videography, the time is ripe that steps are taken to introduce videography in investigation, particularly for crime scene as desirable and acceptable best practice as suggested by the Committee of the MHA to strengthen the Rule of Law. We approve the Centrally Driven Plan of Action prepared by the Committee and the timeline as mentioned above. Let the consequential steps for implementation thereof be taken at the earliest.”

49. This Court in ***Ram Prakash v. State, 2014 SCC OnLine Del 6936*** acquitted the accused person on the ground of lack of videography and observed that the case of the prosecution is not proved beyond reasonable doubt and granted benefit of doubt to the accused. Relevant para is extracted below:-

“22. The Court can only observe that with so many technological advances where satellite imagery to the smallest degree of precision of any location in the world is available, the Delhi police can no longer be excused for not improving its methods of gathering and presenting evidence. Considering that the raid was going to take place in a busy place like the Old Delhi Railway Station parking lot, and in broad daylight, it should have been possible for the police to arrange for a videograph of the place or perhaps of the



raid itself, if not photographs.

23. Also clearly there are CCTV cameras all over the place outside the Old Delhi Railway Station including its parking lot. There was no effort made to collect the CCTV footage of the relevant time. Not only would it have showed how the Appellant reached the spot with the three bags but also it could have been placed on record to show the raid placed on record to shown the raid as it took place.”

50. A coordinate bench of this Court in ***Bantu v. State (NCT of Delhi), 2024 SCC OnLine Del 4671*** has discussed the said contention in detail and has observed as under:-

“81. Realizing the need of changing time, the legislature has now passed the Bharatiya Nagarik Suraksha Sanhita (‘BNSS’). The practice of photography and videography has now been made mandatory. Even though it is contended that, at the relevant time, the same was not mandatory, it cannot be denied that the Courts have, time and again, discarded the prosecution's story and had emphasized on the importance of independent witnesses and additional evidence in the form of audiography and videography when the same can easily be obtained due to advancement of technology.

82. This legislative enhancement is designed to ensure a more transparent and accountable approach in investigation. BNSS, with its comprehensive emphasis on technological integration, heralds a transformative era in



criminal justice, promoting a system that is not only transparent and accountable but also fundamentally aligned with the principles of fairness and justice.

83. Photography and videography are universally accepted as the best practices for better erudition and appreciation of the evidence. The same ensures that the prosecution is able to better document the recovery during the investigation. BNSS stipulates that the proceedings of search and seizure shall be recorded through any audio - video means preferably through a mobile phone. As noted above, these days mobile phones are handy with almost everyone especially, in a metropolitan city like Delhi.”

51. In NDPS cases, the recovery of the contraband is the fulcrum of the matter. The said recovery becomes a crucial piece of evidence, as it directly links the accused with the crime. Further, the quantity of the contraband is another crucial factor as it plays a significant role in determining the severity of the sentence as the legislation provides specific punishments based on the quantity of the contraband. Therefore, the procedure as prescribed under the NDPS Act must be adhered to when such recovery of the contraband is made. Though lack of photography and videography by itself does not vitiate the trial but the same along with the absence of independent witnesses casts a shadow of doubt on the prosecution's case unless the same is proved by cogent materials.

52. In the present case, the argument of learned counsel for the petitioner that the no videography and photography is done is belied from the



material placed on record and more particularly from the chargesheet where is categorically mentioned that HC Binod has done the photography of the seizure process. Hence, I am of the view that the same will be the subject matter of trial.

Delay in Trial

53. Lastly, learned counsel for the petitioner has argued that there is delay in trial as none of the witnesses out of total 15 witnesses have been examined yet.

54. To grant bail in NDPS Act, the accused person has to cross the hurdle of twin conditions mentioned in section 37 of NDPS Act. Time and again, the Hon'ble Supreme Court in catena of judgments has laid down that the twin conditions can be relaxed provided the accused person has undergone substantial period of incarceration and the trial is unlikely to end in near future. In addition, the accused person has a right to speedy trial which flows from Article 21 of Constitution of India.

55. In *Mohd. Muslim v. State (NCT of Delhi)*, 2023 SCC OnLine SC 352, the Hon'ble Supreme Court observed as under:-

“13. When provisions of law curtail the right of an accused to secure bail, and correspondingly fetter judicial discretion (like Section 37 of the NDPS Act, in the present case), this court has upheld them for conflating two competing values, i.e., the right of the accused to enjoy freedom, based on the presumption of innocence, and societal interest - as observed in Vaman Narain Ghiya v. State of Rajasthan (“the concept of bail emerges from the conflict between the



police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal....”). They are, at the same time, upheld on the condition that the trial is concluded expeditiously. The Constitution Bench in Kartar Singh v. State of Punjab made observations to this effect. In Shaheen Welfare Association v. Union of India again, this court expressed the same sentiment, namely that when stringent provisions are enacted, curtailing the provisions of bail, and restricting judicial discretion, it is on the basis that investigation and trials would be concluded swiftly.....

21. Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.

22. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on



31st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country²⁰. Of these 122,852 were convicts; the rest 4,27,165 were undertrials.

23. The danger of unjust imprisonment, is that inmates are at risk of “prisonisation” a term described by the Kerala High Court in A Convict Prisoner v. State²¹ as “a radical transformation” whereby the prisoner:

“loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes.”

24. There is a further danger of the prisoner turning to crime, “as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal”²² (also see Donald Clemmer's ‘The Prison Community’ published in 1940²³). Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata : immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in



the event of an acquittal, the loss to the accused is irreparable), and ensure that trials - especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily.”

56. The Hon’ble Supreme Court in ***Man Mandal v. State of W.B., 2023 SCC OnLine SC 1868*** granted bail to the petitioners on the ground that they had undergone almost 2 years and the trial is not likely to be concluded in near future. Also, in ***Dheeraj Kumar Shukla v. State of U.P., 2023 SCC OnLine SC 918***, the Hon’ble Supreme Court dispensed the rigors of section 37 of NDPS Act and granted bail to the petitioner therein. Relevant para of the said judgment is extracted below:-

“3. It appears that some of the occupants of the ‘Honda City’ Car including Praveen Maurya @ Puneet Maurya have since been released on regular bail. It is true that the quantity recovered from the petitioner is commercial in nature and the provisions of Section 37 of the Act may ordinarily be attracted. However, in the absence of criminal antecedents and the fact that the petitioner is in custody for the last two and a half years, we are satisfied that the conditions of Section 37 of the Act can be dispensed with at this stage, more so when the trial is yet to commence though the charges have been framed.”

57. The Hon’ble Supreme Court in ***Badsha Sk. v. State of W.B., 2023 SCC OnLine SC 1867*** has granted bail to the petitioner, who had been



in custody for more than 2 years with trial yet to begin.

58. In the present case, the accused has been in custody for almost 2 years. As per the chargesheet, there are total 15 witnesses cited and as of now, not a single witness has been examined. I am of the view that the restrictions given under section 37 of NDPS Act cannot take precedence over the petitioner's rights guaranteed under Article 21 of Constitution of India. Hence, Article 21 of Constitution will prevail over the restrictions given under section 37 of NDPS Act as the petitioner has undergone almost 2 years of custody and the trial is not likely to conclude in near future.

CONCLUSION

59. For the reasons noted above, I am of the view, *prima facie*, that the petitioner has made out a case for grant of bail on the ground of non joinder of independent witnesses and most importantly, delay in trial causing fetters in speedy trial being a right guaranteed under Article 21 of the Constitution.

60. I may also note that there is another FIR No. 246/2022 under section 27, 61 and 85 of NDPS Act, however, the petitioner has not been arrested in the said FIR.

61. For the foregoing reasons, the petitioner herein is released on bail subject to the following terms and conditions:-

- a) The petitioner shall furnish a personal bond in the sum of Rs 20,000 (Rupees twenty thousand only) each with 1 surety in the like amount, to the satisfaction of the concerned trial court;
- b) The petitioner shall not leave the country without the



permission of the concerned court and if the petitioner has a passport, he shall surrender the same to the concerned trial court;

c) The petitioner shall furnish to the IO concerned the cell phone number on which the petitioner may be contacted at any time and shall ensure that the number is kept active and switched on at all times;

d) The petitioner will furnish his permanent address to the concerned IO and in case he changes his address, he will inform the IO concerned;

e) The petitioner shall not indulge in any act or omission that is unlawful, illegal or that would prejudice the proceedings in pending cases, if any;

f) The petitioner shall appear before the concerned Court on every date of hearing unless exempted;

g) The petitioner shall not communicate with, or come into contact with any of the prosecution witnesses, or tamper with the evidence of the case.

62.All the observations made herein above are only for the purpose of deciding the present petition and will have no effect on the merits of the case pending.

63.The petition along with pending applications, if any, are disposed of.

JASMEET SINGH, J

JANUARY 22, 2024/(MSQ)