

# Aas Mohammad vs State Govt. Of Nct Of Delhi on 20 March, 2024

**Author: Navin Chawla**

**Bench: Navin Chawla**

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IN THE HIGH COURT OF DELHI AT NEW DELHI

BAIL APPLN. 2334/2023

AAS MOHAMMAD

..... Appli

Through: Mr.Aditya

Agga

Mr.Naveen Panwar, Mr.Mana

Agarwal, Mr.Yasir Siddiqu

Ms.Shivani Sharma, Advs.

versus

STATE GOVT. OF NCT OF DELHI

..... Responde

Through: Mr.Aman Usman, APP with SI

Sukhraj Singh.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

% 20.03.2024

1. This application has been filed under Section 439 of the Code of Criminal Procedure, 1973 (in short, 'Cr.P.C.') read with Section 36A(3) of Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, 'NDPS Act') praying for the applicant to be released on bail in FIR No.0066/2021 registered at Police Station: Crime Branch, New Delhi, under Sections 20/25 of the NDPS Act.

2. As far as it is relevant for the adjudication of the present bail application, it is the case of the prosecution, that, on 19.04.2021, at about 7.00 P.M., ASI Parmod Singh, in the office of the Special Task Force (STF), Crime Branch, Sunlight Colony, New Delhi, received a secret information that a person named Ashu would come in a truck bearing Uttar Pradesh registration number This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 22/03/2024 at 04:47:37 for supplying the contraband, that is, Ganja to someone at Mathura Road, Harikesh Nagar, Delhi at about 08.30 P.M.. Based on the said information, a trap was laid. The Team of Criminal Branch had apprehended the applicant travelling in a truck bearing registration no.UP-15-BT-7365 at Mathura Road near Harikesh Nagar, Delhi. During the search of the truck, a total of 1502.50 kg of Ganja was recovered from the truck, which was deposited into the Malkhana.

3. It is further alleged that the proceedings under Section 52A of the NDPS Act were conducted by the Duty MM, South-East District, Delhi, and samples were drawn. As per the FSL report, samples were found to be of Ganja (Cannabis).

4. The learned counsel for the applicant, drawing reference of this Court to the FIR, submits that it is the case of the prosecution that on inspection of the truck, 23 plastic katas, each containing 7 bundles with brown colour tape, and further 20 katas, each containing 6 bundles in brown colour tape, were recovered. He submits that, therefore, there were a total of 281 bundles recovered at the time of inspection. He submits that, admittedly, at the time of the recovery of the said contraband, it is only on the basis of the visual inspection and by smell that the Investigating Officer (IO) came to the conclusion that it may be Ganja. Later, proceedings under Section 52A of the NDPS Act were carried out on 23.05.2021, however, instead of drawing samples from each of the bundles, only two samples each were drawn from 43 katas that were recovered.

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5. Placing reliance on the judgment dated 26.04.2023 of a Coordinate Bench of this Court in Bail Appln.557/2023, titled as Sachin Kumar v. State (Govt. of NCT of Delhi), he submits that in identical circumstances, this Court has held that the above sampling procedure would not be proper and it cannot be ruled out that the left over bundles may not be containing the contraband. The Court held that, therefore, rigours of Section 37 of the NDPS Act would not apply as there exists a dispute qua the weight of contraband Ganja that was actually recovered from the accused.

6. He submits that the applicant has been in custody since 20.04.2021 and does not have any criminal antecedents. He submits that, therefore, the applicant is entitled to be released on bail.

7. On the other hand, the learned APP raises a preliminary objection on the maintainability of the present bail application. He submits that the applicant had earlier filed an application for being released on bail, being Bail Appln. no.1965/2022. The said application was withdrawn by the applicant vide order dated 10.04.2023 of this court. He submits that therefore, the second bail application can be filed only on the subsequent facts that may have arisen post the withdrawal of the first application; the same cannot be filed on the grounds that were available to the applicant to be contended at the time of the first application. He submits that, in any case, as the learned Judge who had allowed the applicant to withdraw the first application is available, the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 22/03/2024 at 04:47:38 present application should be placed before the same learned Judge for consideration. In support of the above assertion, he places reliance on the judgment of the High Court of Judicature at Bombay in Ajay Rajaram Hinge v. State of Maharashtra, 2023 SCC OnLine Bom 1551.

8. On merits, he submits that at the time of the recovery of the contraband, each bundle so recovered had been checked and was found to be containing Ganja. The sampling procedure was carried out by the learned Duty MM and, therefore, if any deficiency is found in the same, the same cannot prejudice the case of the prosecution. He further submits that the contraband is still available for inspection and sampling, therefore, mere error in sampling cannot be a ground to release the applicant on bail.

9. To answer the preliminary objection of the learned APP, the learned counsel for the applicant, placing reliance on the judgment of this Court in Nagesh Sharma v. State (NCT of Delhi), 2023 SCC OnLine Del 1830, submits that where the earlier application is withdrawn, it would not act as a bar on the maintainability of a subsequent application seeking bail for the applicant especially on the grounds which were not raised in the previous bail application. He also places reliance on the order dated 15.05.2023 passed by the Supreme Court in SLP(Crl.) No.5685/2023 titled as Zaid Rana v. The State of Maharashtra, to submit that, in the similar circumstances where the High Court had dismissed the second bail application as not maintainable, the Supreme Court had remanded the matter back to the High Court This is a digitally signed order.

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10. He submits that, in the present case as well, the earlier bail application filed by the applicant had been withdrawn by moving an application seeking permission to withdraw the same with liberty to file an application seeking bail before the learned Trial Court. There was no adjudication on merit of the earlier bail application and the same was simply allowed to be withdrawn. He submits that the ground of defect in the sampling procedure was not urged in the earlier bail application.

11. As far as the submission on merits is concerned, the learned counsel for the applicant submits that at the time of inspection, it was only a preliminary opinion which was formed by the IO that the material so recovered is Ganja. The same has to be verified through the process of sampling which, in the present case, is defective for the reasons stated herein above.

12. I have considered the submissions made by the learned counsels for the parties.

13. As far as the preliminary objection of the learned APP on the maintainability of the present application is concerned, it is to be noted that the applicant had withdrawn the earlier bail application by moving a separate application seeking permission to withdraw the said bail application with liberty to file the same afresh as per law. The said application was allowed by the predecessor Bench of this Court vide its order dated 10.04.2023. Though, there is no liberty granted to the applicant, it cannot be denied that the same cannot itself be a bar on the maintainability of a subsequent This is a digitally signed order.

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application seeking bail.

14. It is also not denied that the earlier bail application was not decided by this Court on merit. It is also not denied that the applicant had not taken the plea of defect in the sampling procedure in the earlier bail application that had been filed.

15. In Nagesh Sharma (supra), a Coordinate Bench of this Court under similar circumstances had held as under:

"16. In so far as the contention of learned Senior counsel with respect to the maintainability of the present second application for bail is concerned, it is settled law the successive bail applications, though maintainable, can be entertained only if there is a change in circumstances or any fresh ground is being raised. The Hon'ble Supreme Court, in 'Lt. Col. Prasad Shrikant Purohit v. State of Maharashtra, (2018) 11 SCC 458', held as under:

"30. Before concluding, we must note that though an accused has a right to make successive applications for grant of bail, the court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the court also has a duty to record the fresh grounds which persuade it to take a view different from the one taken in the earlier applications."

17. In the present case, a coordinate bench of this Court had dismissed the first bail application filed on behalf of the present applicant on merits, after examining the contentions raised at the time of hearing of the said bail application. The said order was admittedly carried in appeal before the Hon'ble Supreme Court and the said SLP was dismissed. The Hon'ble Supreme Court, in 'Kalyan Chandra Sarkar v. Rajesh Ranjan This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 22/03/2024 at 04:47:38 alias Pappu Yadav, (2005) 2 SCC 42' has held as under:

"19. The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, still the courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher court or a coordinate Bench must receive serious consideration at the hands of the court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the courts must give due weight to the grounds which weighed with the former or higher court in rejecting the bail application. Ordinarily, the issues which had been canvassed earlier would not be permitted to be reagitated on the same grounds, as the same would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting."

(emphasis supplied)

18. This Court, thus, cannot re-examine the issues determined in the previous bail application. The grounds taken in the previous bail application and decided by the learned Single Judge are therefore, not open for the applicant to raise in the present application, especially when the said order has been upheld by the Hon'ble Supreme Court.

19. A bare perusal of the order dated 24.11.2020 dismissing the previous bail application reflects that no adjudication had taken place with respect to non-compliance of second proviso to section 42(1) of the NDPS Act. In view of the aforesaid, the present application for bail is being examined on the ground raised with respect to non-compliance of second proviso to Section 42(1) of the NDPS Act and the period of incarceration."

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16. In Zaid Rana (supra), the Supreme Court had also remanded the bail application to the High Court for a fresh consideration, where the High Court had dismissed the same observing that it was not maintainable in form of a review. In the said case also, the applicant therein had chosen to withdraw the earlier bail application.

17. In Ajay Rajaram Hinge (supra), the learned Single Judge of the High Court of Judicature at Bombay observed that sine qua non for filing the subsequent bail application(s) is a material change in circumstance, however, change in circumstance has no bearing on the salutary principle of judicial propriety that successive bail application needs to be decided by the same Bench on merits, if available at the place of sitting.

18. While there can be no dispute with the above salutary principle which seeks to ensure that a litigant does not indulge in Bench hunting, at the same time, a discretion has to be vested with the successor Judge to determine from the facts of each case if it would be appropriate that the subsequent bail application should be placed before the same Bench which had earlier allowed the applicant to withdraw the earlier application seeking bail.

19. In the present case, as noted hereinabove, the earlier bail application was withdrawn, and that too almost a year back, that is, on 10.04.2023. It is not the case of the prosecution that the application had been heard and only when it was about to be dismissed, that the same was withdrawn. In fact, as stated by the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 22/03/2024 at 04:47:38 learned counsel for the applicant, a separate application, even before the date of hearing, was filed to seek withdrawal of the said bail application.

20. The learned Single Judge, who had allowed the applicant to withdraw the earlier bail application, is now not on the Roster of criminal jurisdiction. Therefore, in my opinion, other than causing delay in the adjudication of the present application, no useful purpose would be served by sending the present bail application to the same Bench; this would, in fact, be a waste of judicial time.

21. As far as the merits of the case is concerned, it is evident that a total of 43 kattas containing a total of 281 bundles were recovered from the truck. Samples were not drawn from each bundle, but only from 43 kattas as a whole. From which bundle the sample was drawn is not evident from the record of proceedings under Section 52A of the NDPS Act dated 23.05.2021.

22. In Sachin Kumar (supra), a Coordinate Bench of this Court, in similar circumstances, where from the accused 4 kattas each containing 4 brown tape bundles had been recovered, however, only 2 samples from each of the kattas containing 4 brown tape bundles, making it total of 8 numbers of samples, had been drawn, held that the same does not appear to be a correct mode of sampling, entitling the accused to grant of bail. I may quote from the judgment as under:

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The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 22/03/2024 at 04:47:38 "3. It is the case of the prosecution all the four brown taped bundles in each Katta contained Ganja, however, learned counsel for the petitioner submits that samples were not taken in accordance with law and he referred to the proceedings under Section 52-A of the NDPS Act, which is on record as Annexure 'P4' and is at page No. 134 of the paper-book to say admittedly each plastic katta had four plastic brown taped bundles allegedly containing Ganja and two samples each from every bundle ought to have been taken but instead only two samples were taken from each katta containing four brown taped bundles making it to a total of only eight number of samples whereas total 32 number of samples ought to have been taken.

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7. Considering the above facts where sampling was not done in accordance with law and the proceedings under Section 52-A of the NDPS Act being in line to the objections raised by learned counsel for the petitioner viz samples were not taken from each of the brown taped bundle, raises an apprehension that the brown taped bundles left over may not have contained the contraband. From the proceedings it is also not clear from which of the different bundles lying in Kattas the two samples were taken. It is not clear from out of 16 bundles the samples were taken from which of the four Kattas and hence rigors of Section 37 NDPS Act would not apply as there exist a dispute qua the weight of the Ganja actually recovered from the person of the present applicant."

23. Though the learned APP for the State may be right in his submission that the procedure was conducted before the learned Duty Magistrate, at the same time, it is the duty of the prosecution to guide the learned Magistrate on the proper sampling procedure. In any case, if there is a defect in the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 22/03/2024 at 04:47:38 sampling procedure, the benefit of the same has to be given and can be used by the accused.

24. In view of the above discussion, in my view, the applicant has been able to make out a case for the grant of bail by meeting the standards applicable under Section 37 of the NDPS Act, especially taking into account the defect in the sampling procedure, lack of criminal antecedents, and his continued detention since 20.04.2021. Out of 17 witnesses, only about 3 witnesses have so far been examined, and the trial is not likely to conclude any time soon.

25. Accordingly, it is directed that the applicant be released on bail in FIR No.0066/2021 registered at police station: Crime Branch, New Delhi, under Sections 20/25 of the NDPS Act on furnishing a personal bond in the sum of Rs.50,000/- with one local surety of the like amount, subject to the satisfaction of the learned Trial Court, and further subject to the following conditions:

- i. The Applicant will not leave the country without the prior permission of the Ld. Trial Court.
- ii. The Applicant shall provide his permanent address to the Ld. Trial Court. The applicant shall also intimate the Court, by way of an affidavit, and to the IO regarding any change in his residential address.
- iii. The Applicant shall appear before the Ld. Trial Court as and when the matter is taken up for hearing.
- iv. The Applicant shall provide all/latest/fresh mobile numbers to the IO concerned, which shall be kept by the This is a digitally signed order.

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v. The Applicant shall not indulge in any criminal activity and shall not communicate with or come in contact, directly or indirectly, with any of the prosecution witnesses. In case the Applicant is found involved in another case, it will be open to the prosecution to file an appropriate application seeking cancellation of his bail in the present case as well.

26. Needless to state, any observation touching the merits of the case is purely for the purposes of deciding the question of grant of bail and shall not be construed as an expression on the merits of the matter.

27. The Bail Application is disposed of in the above terms.

28. Copy of this order be sent to the Jail Superintendent for information and necessary compliance.

NAVIN CHAWLA, J MARCH 20, 2024 RN/ss Click here to check corrigendum, if any This is a digitally signed order.

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