

IN THE COURT OF ASJ/SPECIAL JUDGE/NDPS
PATIALA HOUSE COURTS, NEW DELHI

Presided by: Sudhir Kumar Sirohi, DHJS

FIR No. 166/19
PS Special Cell
State Vs. Mohd. Shamim

SUDHIR KUMAR SIROHI
Special Judge NDPS Act
Room No. 35, P. Building
Patiala House Courts,
New Delhi

22.11.2023

Present: Mr. Shiv Kumar, Ld. Addl. PP for State.

Mr. Aditya Agarwal and Mr. Manas Agarwal, Ld.
counsel for accused.

Brief facts of the case are that on receipt of a specific secret information, a team led by SI Surender Singh and consisting of other members of team was organized and a trap was laid near Shamshan Ghat, Shalimar Bagh Village, Delhi and Sakil Ahamd @ Roni, Subhankar Haldar @ Shubham and Riyaz Khan were apprehended at about 12:40 PM on 20/09/2019. In presence of Shri Nishant Gupta, ACP/Special Cell/NR, search of pithhu bag of Sakil was conducted and during search, 03 kgs of heroin was recovered from him. During search of Scorpio car No. AS02L- 0123, 05 kgs heroin was recovered from foot rest of conductor side seat and 02 kgs heroin was recovered from secret cavity made under the middle seat of Scorpio car nad case was got registered by SI Surender Singh and subsequent investigation is being conducted by SI Anukul. All accused persons were subjected to sustained interrogation upon which they disclosed that they were part of an interstate narcotic syndicate. Accused Sakil Ahmad disclosed that he used to supply heroin to various persons in Delhi/NCR, UP, West Bengal after procuring it from



Ali Hasan, resident of Manipur. Sakil Ahmad further disclosed that sometimes, he also procured heroin from one Hashim @ Rashid, resident of Manipur. He used to supply heroin to various persons namely Swapan Haldar resident of West Bengal, Shamim, resident of Lucknow and other persons. Accused Riyaz Khan disclosed about supply of heroin to various persons on the direction of Ahmad after procuring it from one Sanatma, resident of Manipur on the directions of Sakil. Riyaz Khan further disclosed that Sakil Ahmed used to talk to his contacts upon their mobile phones and give directions to him to supply heroin at their places. Accused Shubhankar Haldar disclosed that earlier, he used to work as a carrier of one Swapan Haldar r/o West Bengal. He used to supply heroin to various persons on the directions of Swapan Haldar. Thereafter, he came in contact with Sakil Ahmad and started working as carrier of Sakil Ahmed. He used to supply heroin to Shamim, resident of Lucknow, UP on the directions of Sakil Ahmad after procuring it from Hasan, resident of Manipur. Application for conducting 52A proceedings was moved before the Hon'ble court on 29/10/2020 and the proceedings u/s 52 A NDPS Act was got conducted before the Hon'ble court of Sh. Umesh Kumar, LD. MM, Patiala House courts on 28/11/2020. Search of co-accused Shamim of (Barabanki) Uttar Pradesh was made, but he was not traced despite of sincere efforts. On 09/05/2022, accused Shamim was declared proclaimed offender from the Hon'ble Court. On 31/03/2023, accused Shamim s/o Amin r/o Village Tikra Chandauli, PS Jaidpur, Tehsil Barbanki, District Barabanki (Uttar Pradesh) (Age-41 years) has been arrested by Crime Branch (Delhi). Accused Shamim was in constant touch of other co-



accused persons, already arrested in present case. There were incriminating voice calls of accused Shamim with accused Swapna Haldar, Subhankar @ Shubham Haldar. Many mobile numbers suspectedly used by members of syndicate and their other associates were on interception. Monitoring of interception revealed that all members of this syndicate were communicating with each other and their associates about drugs in code words. These incriminating voice calls among the members of this narcotic syndicate are stored in computer system installed in the office of Special Cell/NR. An application for taking voice sample of accused Md. Shamim was moved before the Court and after approval, voice samples of accused Md. Shamim were taken by FSL authorities on 10/08/2023. The result of voice sample is pending. Information sheet of accused Md. Shamim was verified from PS Jaidpur District Barabanki, UP. He was found previously involved in Case FIR No. 261/2006 U/s 401 IPC PS Hussainganj, Lucknow. Accused Shamim was arrested after he was declared PO in present case.

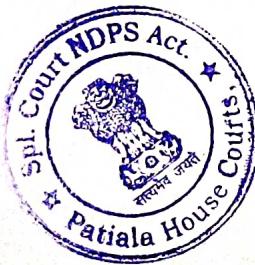
Ld. counsel for accused argued that the accused has been falsely implicated in this matter, there is alleged recovery of 10 kg of heroin as per case of prosecution from accused Shakil Ahmed, Subhankar and Riyaz Khan when they were apprehended with vehicle no. AS02L 0123 and it is also the case that the applicant is supplier of contraband but there is no money transaction between applicant and co accused who was found in possession of contraband. It is further argued by Ld. counsel for accused that FSL result qua voice sample is pending but even otherwise also there is nothing in the transcription to show that the applicant is involved any syndicate and in whole transcription



nowhere any drug has been mentioned nor the transcription gave inference that applicant is talking about any contraband. It is further argued by Ld. counsel for accused that mandatory Section 52A NDPS Act has not been followed in this matter, there is no previous involvement of accused under NDPS Act and accused was declared PO before arrest in this matter as accused was not aware that any matter is pending against him, therefore, accused may be admitted to bail.

Ld. counsel for accused relied upon the following judgments/orders:

- A. *Amit Ranjan Versus NCB (Bail Application No. 1189/2020) decided by Hon'ble High Court of Delhi on 23.05.2022.*
- B. *Sanjay Negi Versus State (Bail Application No. 302/2022), decided by Hon'ble High Court of Delhi on 13.07.2022*
- C. *Sumant Vs State" In Bail Appln. 572/2022, decided by Hon'ble High Court of Delhi on 31.03.2022,*
- D. *Haresh Rawal Versus Narcotics Control Bureau Bail Application No. 1177/2021 decided by Hon'ble High Court of Delhi on 03.06.2021*
- E. *Kale Ram Kalu Ram Versus Narcotics Control Bureau" (Bail Application No. 3045/2019) decided by Hon'ble High Court of Delhi on 10.03.2022*
- F. *Jalil Khan Vs State" Bail Appln, 2585/2021, decided by Hon'ble High Court of Delhi on 18.11.2022*
- G. *Bharat Chaudhary V Union Of India, 2021 Scc Online Sc 1235*
- H. *Kingsley Ofobike Vs. Narcotics Control Bureau, Bail Application No. 2468/2022, decided by Hon'ble High Court of Delhi on 12.07.2023*



- I. *Ajmal T.A @ Kuru Versus State Of Kerela, Crl. Appeal No. 6599/2023 decided by Hon'ble Supreme Court of India on 23.08.2023,*
- J. *Dinesh Khangar @ Rahul Versus State Nct of Delhi, Bail Application No. 1425/2023 decided by Hon'ble High Court of Delhi 11.08.2023*
- K. *Axat Gulia Versus State Bail Application No. 1443/2023 decided by Hon'ble High Court of Delhi 07.08.2023*
- L. *Paramjit Singh Gulati Versus Directorate Of Revenue Intelligence" (Bail Application No. 672/2022) decided by Hon'ble High Court of Delhi 13.01.2023.*
- M. *Jasbir @ Jassu Versus The State (NCT Of Delhi) decided on 24.08.2023 (Bail Application No. 471/2023)*
- N. *Sebil Elanjiimpally Vs State Of Odisha Slp (Crl.) No. 3518 Of 2023, May 18, 2023.*
- O. *Rabi Prakash Vs. The State of Odisha in SLP (Crl.) No (s). 4169/2023 rendered on 13.07.2023 and*
- P. *Yusuf @ Asif Criminal Appeal no. 3191 of 2003 decided by hon'ble Supreme Court of India on 13.10.2023.*
- Q. *Priyaaranjan Sharma Vs. State Bail Appln No. 3649/2022 dated 16.08.2023 by Hon'ble High Court of Delhi.*

Ld. Addl. PP for State on the another hand strongly opposed the bail application and submitted that the applicant is the master mind of intrastate narcotic syndicate and in the transcription, applicant is asking about weight from the accused Swapna Haldar and the applicant Swapna haldar are talking of maal of Malda and Manipur, also stating that weight has increased and they are talking in code word of 'kapda', the applicant is not dealing in any business of cloth, therefore, this shows that they are talking about drugs. It is further argued by



Ld. Addl. PP for State that application u/s 52A NDPS Act was filed on 29.10.2020, the proceedings u/s 52A NDPS Act was concluded on 28.11.2020 and the sample of contraband taken on the spot by police officials were sent to FSL. It is further argued by Ld. Addl. PP for State that other two accused have been declared PO and against the accused Ali Hasan open dated NBW has been obtained, the present accused was also declared PO before arrest, therefore, if bail is granted to accused then accused will abscond.

Submissions of all the parties heard.
Judgments/Orders perused.

In *Simarjit Singh Vs State of Punjab, SLP No. 1958/2023 dated 09.05.2023* Hon'ble Apex courts held as:

5. The learned counsel appearing for the appellant relied upon a decision of this Court in the case of *Union of India v. Mohanlal & Anr.* He submitted that the prosecution is vitiated as the work of drawing sample was done by PW-7 without taking recourse to sub-section 2 of Section 52A of the NDPS Act. He also pointed out that the examination-in-Chief of PW-7 SI Hardeep Singh which shows that the samples were drawn immediately after the seizure.

6. The learned counsel appearing for the respondent-State supported the impugned judgments.

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

8. In paragraphs 15 to 17 of the decision of this Court in Mohanlal's case, it was held thus:

"15. It is manifest from Section 52-A(2) include (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-



charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure."

9. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court



In the case of Mohanty I. This creates a serious doubt about the prosecution's case that substance recovered was a contraband.

10. Hence, the case of the prosecution is not free from suspicion and the same has not been established beyond a reasonable doubt. Accordingly, we set aside the impugned judgments insofar as the present appellant is concerned and quash his conviction and sentence.

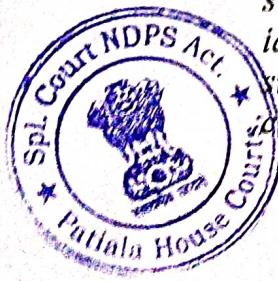
In the judgment of Yusuf @ Asif Vs. State, Criminal Appeal No. 3191/2023 Hon'ble Supreme Court of India has held:

"11. For the sake of convenience, relevant sub-sections of Section 52A of the NDPS Act are reproduced hereinbelow:

"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 subsection (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 subsection (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 or 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 subsection (2), the Magistrate shall, as soon as maybe, 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 subsection (2) and certified by the Magistrate, as primary evidence in respect of such offence."*

12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub-section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.



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 subsection (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 Union of India vs Mohanlal and Anr. (2016) 3 SCC 379 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.

17. Accordingly, we are of the opinion that the failure of the concerned authorities to lead primary evidence vitiates the conviction and as such in our opinion, the conviction of the appellant deserves to be set aside. The impugned judgment and order of the High Court as well as the trial court convicting the appellant and sentencing him to rigorous imprisonment of 10 years with fine of Rs.1 lakh and in default of payment of fine to undergo further imprisonment of one year is hereby set aside.”

In the present matter, the sample drawn by the seizing IO at the time of seizure were sent to FSL, the application u/s 52A NDPS Act was filed on 29.10.2020 (after delay of more than 1 year) and disposed of 28.11.2020 but the sample drawn under 52A NDPS act proceedings were not sent to FSL, therefore, the samples drawn before Ld. Magistrate were not sent to FSL which would have form primary evidence as per *Yusuf (supra)* judgment and in *Priyaranjan Sharma Vs. NCT of Delhi Bail Appl. No. 3649/2022 dated 16.08.2023, Hon'ble Delhi High Court* has also held “*that apart, even sending of the samples drawn by the complainant, instead of those drawn by Magistrate, for chemical analysis to the FSL, prima facie appears to be in violation of provisions of Section 52A NPDS act.*”



Hon'ble High Court of Delhi in *Kasif (supra)* has taken view that section 52A NDPS Act is mandatory and cannot be delayed or ignored.

In *Amina Vs State of NCT of Delhi, BA No. 3805/2022* decided on 02.06.2023 Hon'ble High Court of Delhi held as:

30. *The lack of compliance of these provisions necessarily imports an element of "doubt", moreover a "reasonable doubt". This, therefore will segway into the issue of proving guilt, considering that the guilt of any accused has to be proved beyond reasonable doubt. It would therefore not be enough to contend, as is done by the prosecution that issues of non-compliance were to be considered at the time of trial and what prejudice is caused to the accused, had to be shown by the accused. Even if that may be so, if such non-compliance provides reasonable ground for acquittal of an accused [depending on the nature of the evidence led, as it was in the case of Amani Fidel (supra)], a fortiori at the stage of granting bail, it would be even more important to consider this possibility, even if it is just a possibility. At the stage of granting bail, the accused is still not proved as guilty and is under trial and therefore deserves the benefit of doubt.*

Therefore, at this stage, it seems to be non compliance of mandatory provision as per *Yusuf (supra)* and *Simarjeet (supra)* judgments and the benefit must be given to the accused at the stage of bail also as per *Amina (supra)* order. There is no monetary transaction between the present accused/applicant and remaining co-accused persons. In the whole transcription nowhere the name of any contraband or drug has been mentioned though the applicant is asking for rate of



Manipurwala and Maldawala even if it is considered that they are talking about contraband but then also but there is violation of mandatory provision of Section 52A NDPS Act, therefore, in the present facts and circumstances, accused Mohd. Shamim is admitted to bail on furnishing personal bond and surety bond in the sum of Rs. 1 lakh with two sureties in the like amount subject to the following conditions:-

1. he shall provide his mobile numbers to the IO;
2. he shall keep his mobile phone 'ON' at all times;
3. he shall keep his GPS location 'ON' all the time;
4. he will deposit his passport in the court during the period of bail and if he does not have passport then to file the affidavit in this regard in the court or in absence of passport, LOC be opened against accused.
5. he shall mark his attendance in the concerned police station on first Monday of every month till trial is completed;
6. he shall not leave the India under any circumstances without prior permission of trial court;
7. he shall not commit any offence whatsoever during the period that he is on bail in the instant case;
8. In the event of there being any FIR/DD Entry/complaint lodged against the applicant/accused it would be open to the State to seek cancellation of bail of the accused.

Accordingly, bail application of accused stands disposed off. Copy of this order be given dasti and be also sent to accused in jail for communication to the accused.



Sudhir Kumar Sirohi
ASJ/Spl. Judge, NDPS/N. Delhi

22.11.2023
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