IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:08.07.2024

\+ **BAIL APPLN.2537/2023**

SOVRAJ ..... Applicant

versus

STATE GOVT.OF NCT OF DELHI ..... Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Aditya Aggarwal and Mr. Naveen Panwar, Advs.

For the Respondent : Mr. Utkarsh, APP for the State with SI Mohd. Kafeel, PS K.M. Pur.

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HON'BLE MR JUSTICEAMIT MAHAJAN

JUDGMENT

1. The present application is filed under Section 439 of the Code of Criminal Procedure, 1973 ('**CrPC**') seeking release on bail in relation to the case FIR No.78/2021 dated 16.02.2021, registered at Police Station K.M. Pur for offence under Section 20 of the Narcotics Drugs and Psychotropic Substances Act, 1985 ('**NDPS**'). Chargesheet has been filed for the offence under Section 20 of the NDPS Act against the applicant.

BRIEF FACTS

2. The case of the prosecution is that, on 15.02.2021, secret information was received that a Nepali national, who lives in Kotla, would go come at Sewa Nagar, Sabji Mandi to supply a huge amount of Charas to someone. It is alleged that at about 11 PM, a boy carrying a shoulder bag came to the spot and was apprehended by the raiding team. The said boy disclosed his name to be Barun Kumar Bantawa (co-accused). On searching his bag, 23 brick type pieces in transparent polythene were found. It is alleged that 11 Kg 592 gram of Charas was recovered.

3. The co-accused disclosed that he along with his friend, that is, the applicant, used to bring Charas from Nepal to supply the same in Delhi. On the basis of the disclosure of the co-accused, the applicant was apprehended on 16.02.2021. A notice under Section 50 of the NDPS Act was served upon the applicant. It is alleged that the applicant disclosed that he had Charas in his bag. On searching the bag of the applicant, 10 bricks total weighing 4.396 kg of Charas were found. It is alleged that the applicant disclosed that he along with the co-accused had brought 16 kg of Charas on 15.02.2021 from Nepal.

4. Upon completion of the investigation, the chargesheet in the present case was filed for offences against the applicant and the co-accused, for offence under Section 20 of the NDPS Act.

5. The alleged recovery is of commercial quantity of contraband.

6. The learned Trial Court dismissed the regular bail application moved by the applicant *vide* order dated 12.01.2022, hence the present

application.

SUBMISSIONS ON BEHALF OF THE OF THE APPLICANT

7. The learned counsel for the applicant submitted that the applicant has been falsely implicated in the present case. He submits that there are serious infirmities in the case of the prosecution. He submitted that even though the purported recovery happened in a public place, there are no independent witnesses.

8. He submitted that there is a delay in sending samples to the FSL. He submitted that the application under Section 52A of the NDPS Act was filed on 09.04.2021, whereas the samples were drawn before the learned Magistrate on 22.04.2021 and the samples were sent to FSL on 30.04.2021. He submitted that the same is in contravention of Standing Order No. 1/88 dated 15.03.1988 (hereafter '**Standing Order No.1/88**') whereby it is stipulated that samples must be dispatched to the Laboratory within 72 hours of seizure to avoid legal objection.

9. He submitted that the application for sampling and disposal ought to be made without any loss of time and Section 52A does not brook any delay in the same [Ref. ***Union of India v. Mohanlal : (2016) 3 SCC 379***].

10. He further submitted that the samples were improperly drawn in the present case. He submitted that it is trite law that the quantity which is allegedly to be recovered does not matter and the point of consideration is whether the proper procedure is followed or not and if

the proper procedure as stated by this Hon'ble Court has not been followed, regular bail ought to be granted as acquittal is the only outcome (Ref. ***Basant Rai v. State*** **: 2012 SCC OnLine Del 3319**).

11. He submitted that Standing Order No. 1/88 is a requirement of law. He placed reliance on the judgment of this Court in the case of ***Laxman Thakur v. State (Govt. of NCT of Delhi)*** **: 2022:DHC:5591** to buttress his arguments.

12. He submitted that the proceedings under section 52A of the act were conducted after a delay of 78 days, which is fatal to the case of prosecution. He further submitted that the Courts have given benefit to the accused where the samples have not been sent to the FSL within 72 hours. He relied upon following cases:

a) ***Satnam Singh Sattu v. State of Punjab*** **:2017 SCC OnLine P&H 1216**
b) ***Om Parkash v. State*** **: 2014:DHC:2758**
c) ***Ramji Singh v. State of Haryana*** **: 2007 SCC OnLine P&H 213**

13. The applicant has relied upon the judgements in the cases of ***Tamir Ali v. Narcotics Control Bureau*** **: 2023:DHC:3545**, ***Amina v. State NCT of Delhi*** **:2023:DHC:4024**, ***Sarvothaman Guhan v. Narcotics Control Bureau*****: 2023:DHC:6614**, ***Krishan @ Babu v. The State Govt of NCT of Delhi*** **: Bail Appln. 2804/2023**, ***Gurpreet Singh v. State of NCT of Delhi*** **: 2024:DHC:796** and ***Hikmatullah Hikmati v. Narcotics Control Bureau*** **: 2024:DHC:1263**,wherein Coordinate Benches of this Court have granted bail to the accused person therein

after considering the factum of delay in filing of application under Section 52A of the NDPS Act. He argued that it has been held in the said cases that the benefit of such violation will accrue to the accused person at the time of consideration of bail.

14. He submitted that the applicant has satisfied the bar under Section 37(1)(b)(ii) of NDPS Act of establishing reasonable grounds for believing that he is not guilty of such offence.

15. He submitted that the applicant has been in custody for more than 3 years and that there is no possibility of the applicant influencing the witnesses. He submitted that applicant has clean antecedents and deep roots in the society.

16. He submitted that the matter is still at the stage of prosecution evidence. He relied upon the observations of the Hon'ble Supreme Court in ***Mohd. Muslim v. State (NCT of Delhi)*** **: 2023 SCC OnLine SC 352** to submit that grant of bail is not fettered by Section 37 of the NDPS Act in case of undue delay in trial.

SUBMISSIONS ON BEHALF OF THE PROSECUTION

17. *Per contra*, the Additional Standing Counsel for the State opposed the bail application. He submitted that the case pertains to recovery of commercial quantity of contraband from the possession of accused therefore the rigours of Section 37 of the NDPS Act would be attracted. He submitted that Section 37 of the NDPS Act cannot be given liberal interpretation on the justification that it affects the personal liberty of a citizen who is yet to be tried.

18. He submitted that the argument of the applicant with respect to non-compliance of section 52A of the NDPS is not to be considered at this stage as the question of whether any prejudice was caused to the applicant by the alleged irregularity in the seizure and procedure of sampling would be tested during the trial.

19. He submitted that Coordinate Bench of this Court in the case of ***Somdutt Singh @ Shivam v. Narcotics Control Bureau* : 2023:DHC:8550** had denied the bail to the accused holding that no conclusive view could be taken on the issue of non-compliance of Section 52A of the NDPS Act at the stage of considering the application for grant of bail.

20. He submitted that non-compliance of procedural requirements is to be tested during the course of the trial. In this regard, he placed reliance on the judgments of Coordinate Benches of this Court in ***Gauri Shankar Jaiswal v. Narcotics Control Bureau* : 2023 SCC OnLine Del 3327** and ***Surender Kumar v. Central Bureau of Narcotics*: 2023 SCC OnLine Del 6839**.

21. He further relied on the following judgments to buttress his arguments:

a. ***Naveed Ummer Sheikh v. Narcotic Control Bureau through Shri Mukesh Malik Porsecutor NCB* : 2021:DHC:3781**
b. ***Bipin Bihari Lenka v. Narcotic Control Bureau* : Bail Appln. 3291/2021**
c. ***Shailender v. State of Nct of Delhi* : 2022:DHC:1474**
d. ***Saddad Alam v. State (Govt. Of Nct Of Delhi)* :**

2023:DHC:7494

ANALYSIS

22. Arguments were heard in detail from the learned counsel for the parties.

23. It is settled law that the Court, while considering the application for grant of bail, has to keep certain factors in mind, such as, whether there is a prima facie case or reasonable ground to believe that the accused has committed the offence; circumstances which are peculiar to the accused; likelihood of the offence being repeated; the nature and gravity of the accusation; severity of the punishment in the event of conviction; the danger of the accused absconding or fleeing if released on bail; reasonable apprehension of the witnesses being threatened; etc.

Rigours of Section 37 of the NDPS Act

24. It is unequivocally established that, to be granted bail, the accused charged with offence under the NDPS Act must fulfill the conditions stipulated in Section 37 of the NDPS Act. Section 37 of the NDPS Act reads as under:

> *"**37. Offences to be cognizable and non-bailable**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—*
>
> *(a) every offence punishable under this Act shall be cognizable;*
>
> *(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—*

> *(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and*
>
> *(ii) where the Public Prosecutor oppose the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.*
>
> *(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force, on granting of bail."*

25. The accusation in the present case is with regard to the recovery of commercial quantity of contraband. Once the rigours of Section 37 of the NDPS Act are attracted, as provided under the Section, the Court can grant bail only when the twin conditions stipulated in Section 37(1)(b) of the NDPS Act are satisfied in addition to the usual requirements for the grant of bail – (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; and (2) That the person is not likely to commit any offence while on bail.

26. The learned counsel for the applicant submitted that a liberal interpretation of Section 37 of the NDPS Act must be taken by the Court in the present case on the following grounds :

a) Delay in filing application under Section 52A of the NDPS Act before the learned Magistrate and delay in sending of samples to FSL;

b) Sampling not done as per the procedure established by law as the sample was not drawn from each packet;

c) Non-joinder of independent witnesses by the prosecution and no photography and videography; and

d) Delay in trial.

Delay in filing application under Section 52A of the NDPS Act & delay in sending samples to FSL

27. The learned counsel for the applicant has pressed the present bail application primarily on the ground of delay in filing of application under Section 52A of the NDPS Act. He submitted that the same entitles the applicant to bail. Section 52A of the NDPS Act reads as under:

> *"**52A. Disposal of seized narcotic drugs and psychotropic substances.—***
> *(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.*
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> *(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 innventory, 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."

28. The learned counsel for the applicant has also placed reliance on Standing Order No.1/88 which provides that samples must be dispatched to the FSL within 72 hours of the seizure. The relevant portion is reproduced hereunder:

"***1.13. Mode and Time limit for dispatch of sample to Laboratory:*** *The samples should be sent either by insured post or through special messenger duly authorized for the purpose. Despatch of samples by registered post or ordinary mail should not be resorted to.* ***Samples must be dispatched to the Laboratory within 72 hours of seizure to avoid any legal objection.***"

(emphasis supplied)

29. In the present case, the applicant was arrested on 18.02.2021 and the application for sampling was filed under Section 52A of the NDPS Act before the learned Magistrate on 09.04.2021. The order for

sampling was passed by the learned Magistrate on 22.04.2021. The samples drawn on spot were sent to FSL for report on 01.04.2021 and the samples drawn before the learned Magistrate were sent to FSL on 30.04.2021.

Scope of Section 52A of the NDPS Act

30. The learned counsel for the applicant has stressed that non-compliance of provision of Section 52A of the NDPS Act is fatal for prosecution. In this regard, he has placed reliance on the judgment of the Hon'ble Apex Court in the case of ***Union of India v. Mohanlal*** (*supra*), where it was held that it is mandatory that sampling needs to be done before the learned Magistrate without loss of time. Directions were also issued to the Central Government and State Governments to designate an officer for respective storage facility and to provide for other steps, including measures such as stipulated in Standing Order No.1/89 dated 13.06.1989 (hereafter '**Standing Order No.1/89**') to ensure proper security against theft or replacement of the seized drugs. The relevant portion of the said judgement is reproduced hereunder:

> "***15.*** *It is manifest from Section 52-A(2)(c) (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.*

18. *Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.*

19. *Mr Sinha, learned Amicus Curiae, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification, etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets*

neglected for a variety of reasons. ***There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52-A (supra).*** *We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions."*

(emphasis supplied)

31. The purpose of incorporation of Section 52A of the NDPS Act is to mitigate the issue of the hazardous nature of the contraband, vulnerability to theft, substitution, constraint of proper storage space, etc. The same is a measure to safeguard the primary evidence even when the contraband is disposed.

32. The Hon'ble Apex Court in the case of ***Mangilal v. State of M.P.*****: 2023 SCC OnLine SC 862,** discussed the scope and purpose of Section 52A in detail. The relevant portion is reproduced hereunder:

"***4.****Sub-section (1) of Section 52A of the NDPS Act facilitates the Central Government a mode to be prescribed to dispose of 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.***

5. *Sub-section (2) of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes.* ***The objective behind this provision is to have an element of supervision by the magistrate over the disposal of seized contraband.*** *Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence.* ***Therefore, when there is non-compliance of Section 52A of the NDPS Act, where a certification of a magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence.***

6. The obvious reason behind this provision is to inject fair play in the process of investigation. *Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn…*

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8. Before any proposed disposal/destruction mandate of Section 52A of the NPDS Act requires to be duly complied with starting with an application to that effect. A Court should be satisfied with such compliance while deciding the case. *The onus is entirely on the prosecution in a given case to satisfy the Court when such an issue arises for consideration. Production of seized material is a factor to establish seizure followed by recovery.*"

(emphasis supplied)

33. From the marginal note of Section 52A of the NDPS Act, it is evident that the said provision exclusively deals with disposal of the seized narcotic drugs and psychotropic substances.

34. Section 52A of the NDPS Act deals with how the contraband is to be disposed of as per the procedure prescribed under the said section. However, where the contraband has not been disposed but is available during the course of trial, Section 52A of the NDPS Act will have no application.

35. Thus, it is clear that the provision of Section 52A of the NDPS is mandatory and is to be duly complied with before disposal/destruction of the contraband. The same also makes it clear that it is a safeguard against unruly practices to prevent substitution of the contraband which could prejudice the accused person.

36. It is not disputed that in any trial under the NDPS Act, a contraband itself is the primary piece of evidence to prove the guilt of the accused. The legislature has incorporated Section 52A of the NDPS Act recognizing the hazardous nature of the contrabands and their exposure to issues such as vulnerability to theft, substitution, constraint of proper storage space and chances of manipulation.

37. Section 52A of the NDPS Act provides the procedure as to how the prosecution is required to prepare the inventory and file an appropriate application before the Magistrate for resultant sampling and certification of the inventory without causing delay.

38. It is provided that in such a scenario, the certificate issued by the Magistrate would be treated as the primary evidence. That necessarily means that in a case where narcotic drugs or psychotropic substances are disposed of, the factum of recovery and the nature and authenticity of the contraband which forms the subject matter of the

trial can be proved as per the method and manner as laid down in Section 52A of the NDPS Act by way of producing the certificate given by the Magistrate for inventory as stated therein.

Cases where the contraband has not been disposed of

39. However, in case the narcotic drugs and psychotropic substance is not disposed of, the best proof of its existence would be by the production of the narcotic drugs and psychotropic substances. It is only where originally seized muddamal or contraband is destroyed and is not in existence, that the certificate is required to be pressed into service to prove the recovery. The certificate of the magistrate is treated as primary evidence.

40. While the mere non-observance of the procedure prescribed in Section 52A of the NDPS Act will not vitiate the trial where the contraband has not been disposed of, the same would cast a doubt as to why the prosecution did not seek to destroy the same or legitimize the inventory by preferring an application under Section 52A of the NDPS Act. The said doubt can be duly overcome by the prosecution by justifying the delay in moving an application.

41. The Hon'ble Apex Court in the case of ***Jitendra* v. *State of M.P.* : (2004) 10 SCC 562** observed as under:

> *"**6.** … In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. **The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to***

produce them. *Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act."*

(emphasis supplied)

42. The Hon'ble Apex Court in the case of ***Union of India* v. *Jarooparam* : (2018) 4 SCC 334** observed as under:

*"**9.From the above proceedings, it is crystal clear that the remaining seized stuff was not disposed of by the Executive Magistrate**. The contraband stuff as also the samples sealed as usual were handed over physically to the Investigating Officer Harvinder Singh (PW 6). Also the trial court in its judgment specifically passed instructions to preserve the seized property and record of the case in safe custody, as the co-accused Bhanwarlal was absconding. The trial court more specifically instructed to put a note with red ink on the front page of the record for its safe custody. **In such a situation, it assumes importance that there was nothing on record to show as to what happened to the remaining bulk quantity of contraband**. The absence of proper explanation from the prosecution significantly undermines its case and reduces the evidentiary value of the statements made by the witnesses.*

*10. **Omission on the part of the prosecution to produce the bulk quantity of seized opium would create a doubt in the mind of the Court on the genuineness of the samples drawn and marked as A, B, C, D, E, F from the allegedly seized contraband**. However, the simple argument that the same had been destroyed, cannot be accepted as it is not clear that on what authority it was done. Law requires that such an authority must flow from an order passed by the Magistrate. On a bare perusal of the record, it is apparent that at no point of time any prayer had been made by the prosecution for destruction of the said opium or disposal thereof otherwise. The only course of action the prosecution should have resorted to is for its disposal is to obtain an order from the competent court of Magistrate as envisaged under Section 52-A of the Act. It is explicitly made under the Act that as and when such an application is made, the Magistrate may, as soon as may be, allow the application (see also Noor Aga v. State of Punjab, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748).*

> *11. There is no denial of the fact that the prosecution has not filed any such application for disposal/destruction of the allegedly seized bulk quantity of contraband material nor was any such order passed by the Magistrate. Even no notice has been given to the accused before such alleged destruction/disposal.* ***It is also pertinent here to mention that the trial court appears to have believed the prosecution story in a haste and awarded conviction to the respondent without warranting the production of bulk quantity of contraband. But, the High Court committed no error in dealing with this aspect of the case and disbelieving the prosecution story by arriving at the conclusion that at the trial, the bulk quantities of contraband were not exhibited to the witnesses at the time of adducing evidence."***
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> (emphasis supplied)

43. It is thus clear that the onus is on the prosecution to exhibit the bulk of the contraband when the same has not been disposed.

44. In other words, if the seized goods are in existence and it can be proved by leading reliable evidence, that is, the actual goods that have been seized can be produced, a certificate of magistrate then acquires the nature of secondary evidence and cannot be treated as primary evidence under law. From a holistic reading of section 52A of the NDPS Act, it is evident that it is neither the intention of the legislature nor a requirement under the section to treat the said certificate only as primary evidence.

45. Thus, the proof of contraband, which is before the court, is not dependent upon the application for its disposal. Even otherwise in the aforesaid judgment of ***State of Punjab v. Makhan Chand*** **: (2004) 3 SCC 453**, the Hon'ble Supreme Court has held that the same will not vitiate the trial.

46. Although Section 52A of the NDPS Act says that the certificate given by the Magistrate will be primary evidence, it indicates that the prosecution is not precluded from leading secondary evidence under the Indian Evidence Act, 1872 in the absence of primary evidence.

47. In the case of ***Kallu Khan v. State of Rajasthan*** **: (2021) 19 SCC 197**, the Hon'ble Supreme Court relied upon the judgment of ***Than Kunwar v. State of Haryana*** **: (2020) 5 SCC 260**, where it was observed that if the seizure is otherwise proved and the samples taken from the contraband material are kept intact and the report of the FSL shows the nature and quantity of the contraband material, the essential ingredients of evidence are made out. The Hon'ble Supreme Court upheld the conviction of the accused therein and noted that he had failed to show that the findings of the two Courts suffered from perversity.

48. Therefore, in the opinion of this court, any lapse in the procedure stipulated in the provision of Section 52A of the NDPS Act, which only deals with the mode and manner of disposal, will not accrue any benefit to the accused when the originally seized contraband is before the Court and can been proved by leading evidence. The statutory scheme of NDPS Act read with CrPC and Indian Evidence Act, 1872 clearly shows that establishment of the offence is not dependent upon the manner of disposal of the contraband.

49. The applicant has heavily relied on the judgment in the case of ***Yusuf v. State*** **: 2023 SCC OnLine SC 1328** where the Hon'ble Apex

Court had relied on the judgment in ***Union of India v. Mohanlal*** (*supra*) and observed that in the absence of any material on record that the samples were seized before the Magistrate or that the inventory was certified by the Magistrate, the sample or the contraband would not be a valid piece of primary evidence and the trial will stand vitiated.

50. Similarly, in the case of ***Mohammed Khalid and another v. The State of Telangana*****: (2024) 5 SCC 393**, the Hon'ble Apex Court had held that in the absence of proceedings under Section 52A of the NDPS Act, the FSL report of the samples would be akin to waste paper and could not be read as evidence.

51. Insofar as the judgments in the case of ***Yusuf v. State***(*supra*) and ***Mohammed Khalid and another v. The State of Telangana*** (*supra*) are concerned, they appear to be cases where the muddamal or contraband was disposed of. No arguments to the contrary are noted in the judgments. The said judgments, in the opinion of this Court, will not apply in a case where contraband is not destroyed. From a bare reading of these judgments, it is clear that the Hon'ble Supreme Court was dealing with a situation wherein the muddamal or contraband was destroyed and the original seizure of contraband was not available with the court for being proved as per the Indian Evidence Act, 1872.

52. While no certificate of destruction is present on record to evidence that the contraband is disposed of, in the present case, the contraband has not been exhibited in the Trial Court. On being asked,

it was stated that even though the application was filed before the Magistrate but the contraband seized in the present case is still available in the malkhana. In the facts of the present case, reliance by the applicant on Section 52A of the NDPS Act does not advance his case as the contraband is yet to be disposed of.

53. As held by the Hon'ble Apex Court in ***Mohammed Khalid and another v. The State of Telangana*** (*supra*), when the contraband is not available as an exhibit, the absence of a certificate under Section 52A of the NDPS Act can be fatal to the case of the prosecution since the very primary evidence to prove the recovery of the contraband is not available.

54. It is also relevant to note that the Hon'ble Apex Court in ***State of Punjab v. Makhan Chand*** (*supra*) had held that Section 52A of the NDPS Act only deals with the disposal of seized narcotic drugs and psychotropic substances and the certificate issued by the Magistrate is to be treated as primary evidence in respect of the offence in terms of Section 52A(2) of the NDPS Act. It was also held that Section 52A(1) of the NDPS Act does not lay down the procedure for search of an accused but only deals with the disposal of seized narcotic drugs and psychotropic substances. It was held as under:

> *"**9.** Learned counsel for the respondent-accused relied on certain standing orders and standing instructions issued by the Central Government under Section 52-A(1) which require a particular procedure to be followed for drawing of samples and contended that since this procedure had not been followed, the entire trial was vitiated.*
>
> ***10.** This contention too has no substance for two reasons. Firstly, Section 52-A, as the marginal note indicates, deals with "disposal*

> *of seized narcotic drugs and psychotropic substances". Under sub-section (1), the Central Government, by a notification in the Official Gazette, is empowered to specify certain narcotic drugs or psychotropic substances, having regard to the hazardous nature, vulnerability to theft, substitution, constraints of proper storage space and such other relevant considerations, so that even if they are material objects seized in a criminal case, they could be disposed of after following the procedure prescribed in sub-sections (2) and (3). If the procedure prescribed in sub-sections (2) and (3) of Section 52-A is complied with and upon an application, the Magistrate issues the certificate contemplated by sub-section (2), then sub-section (4) provides that, notwithstanding anything to the contrary contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, such inventory, photographs of narcotic drugs or substances and any list of samples drawn under sub-section (2) of Section 52-A as certified by the Magistrate, would be treated as primary evidence in respect of the offence. Therefore, Section 52-A(1) does not empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances."*

Belated filing of application under Section 52A of the NDPS Act

55. It is relevant to note that the case at hand does not relate to the non-filing of the application under Section 52A of the NDPS Act. In the present case, it is argued that the application has been filed belatedly.

56. The applicant has relied on the judgment in the case of ***Kashif v. Narcotics Control Bureau*: 2023 SCC OnLine Del 2881**. The relevant portion of the judgment is reproduced hereunder:

> ***"24.*** *Hence, I am of the view that* ***non-compliance of section 52A within a reasonable time gives rise to the apprehension that sample could have been tampered with and in case of a wrongly drawn sample, the benefit of doubt has to accrue to the accused****. The prosecuting agency has to prove at the time of trial that the sample was immune from tampering.*

25. In the present case, the sample was kept in the custody of the prosecuting agency for more than one and a half month, thus, raising doubt with regards to tampering of the same.

26. *Another reason which persuades me to take this view is that once the Apex Court has held in* ***Mohanlal*** *(supra) that the* ***application under 52A has to be made without any undue delay, there should not be any reason for delaying the filing of application.***

27. *The application for sample collection under section 52A is not a technical application wherein elaborate reasons, principles of law or detailed facts are required. It is more of a clerical application and should mandatorily be made within a reasonable time under section 52A NDPS.* ***The application has to be moved at the earliest and in case, the same has not been moved, the reasons for delay must be explained by the authorities.***

Reasonable time under section 52A

28. *What is reasonable time depends on the facts and circumstances of each case. However,* ***it cannot be the intention of the legislature that an application for sample collection can be moved at the whims and fancies of the prosecuting agency.*** *Therefore, taking cue from the Standing Order 1/88, it is desirable that the application under 52A should be made* ***within 72 hours*** *or near about the said time frame.*

29. *In the present case, the application for drawing of sample and certification of seizure memo under section 52A NDPS was filed on 22.04.2022 i.e., after 51 days from the period of last seizure on 02.03.2022.*

30. *A period of 51 days, by no stretch of imagination, can be called a reasonable period for filing an application under section 52A NDPS for drawing the sample. It cannot be that the contraband lying in the custody of the Narcotics Department for 51 days, in their power and possession, is immune from tampering and mischief. Furthermore, no reasons have been furnished by the Respondent for the delay of 51 days for moving an application under section 52A NDPS.*

31. In view of the above discussion, I hold that violation of Section 52A vitiates the sample collection procedure and the benefit of the same must accrue to the Applicant.

32. *The application by the respondent under section 52A was filed after a delay of 51 days. At that time, the applicant did not object.*

> *However, the same being a legal objection can be raised at any stage.*
>
> ***33.*** *The applicant has been in custody since 07.03.2022 and more than a year has passed since then. No further custodial interrogation of the Applicant is required. No recovery was made from the Applicant or at his instance.* ***Therefore, the embargo of Section 37 NDPS is not applicable on the Applicant.****"*
>
> (emphasis supplied)

57. It is pertinent to note that the Hon'ble Apex Court in the case of ***Union of India v. Mohanlal*** (*supra*) had specifically noted that while the process of sampling cannot be left to the whims of the prosecution and the application for sampling and certification ought to be made without undue delay, there was no room for prescribing or reading a time-frame into the provision. Though no timeframe has been incorporated in the provision, the application should be made without undue delay. The cause of delay, however, in the opinion of this Court, can be explained by the prosecution during the course of trial and is not fatal.

58. As long as the prosecution is able to justify the delay on its end, mere delay would not vitiate the evidence. To hold otherwise would lead to an odd situation where even a few hours post the threshold of 72 hours would nullify the evidence. The Court has to be cognizant of the ground realities where situations may arise where the sample was not sent to FSL on time or the application under Section 52A of the NDPS Act could not be preferred on time.

59. A Coordinate Bench of this Court in the case of ***Rishi Dev @ Onkar Singh v. State (Delhi Admn.)*****: 2008:DHC:1513**, held that the

delay in sending samples to FSL is to be properly explained by the prosecution. It was also observed that the said reason should be evident from the record itself. The relevant portion of the afore-mentioned judgement reads as under:

> *"20.* ***The delay in sending samples to the CFSL has to be properly explained by the prosecution*** *and further, such explanation can be accepted only where the prosecution shows that it made a genuine attempt to send the sample to the CFSL forthwith and that becauseof the excessive workload of the CFSL, the sample was returned and was unable to be tested. The record must show that such an attempt was made and the sample was returned for reasons not of the making of the prosecution.* ***The lacuna in this regard cannot be permitted to be made up by oral evidence****."*
>
> (emphasis supplied)

60. Thus, it is open to the prosecution to justify the delay on its end and the same would be seen during the course of the trial. It is also relevant to note that while the stipulation of 72 hours is provided in Standing Order No.1/88 for sending the samples to FSL, the same is only a guidance and cannot be read as mandatory when no such timeline is provided in the statute.

61. It is settled law that the guidelines issued by the Government have to be subservient to the statute. They are issued in aid of the statute and cannot nullify the intention of the legislature.

62. Coordinate Bench of this Court in ***Somdutt Singh @ Shivam v. Narcotics Control Bureau*** (*supra*) had dismissed the bail application of the accused person after distinguishing the judgment in the case of ***Kashif v. Narcotics Control Bureau*** (*supra*). It was observed that there was no mandatory time duration prescribed for compliance of Section 52A of the NDPS Act and though it is desirable that the

procedure under Section 52A of the NDPS Act is complied at the earliest, mere delay in the same will not be a ground for bail. It was noted that the onus will be on the applicant to show the prejudice caused on account of the delay.

63. The order passed in the case of ***Somdutt Singh @ Shivam v. Narcotics Control Bureau*** (*supra*) was challenged before the Hon'ble Apex Court in Special Leave Petition (Crl.) No. 415/2024. By order dated 16.05.2024, the Hon'ble Apex Court has dismissed the said special leave petition.

64. In the present case, evidently, the application under Section 52A of the NDPS Act was preferred almost two months after the seizure of the contraband from the applicant. It is open to the applicant to press the aforesaid defence at the time of the trial. However, at this stage, the applicant has failed to establish a *prima facie* case as to how he has been prejudiced on account of the delayed compliance. In the opinion of this Court, any observation as to the veracity of the recovery on account of delay to grant bail to the applicant would be premature.

Improper Sampling: Non-Compliance Of Standing Order No. 1/88

65. The applicant has also challenged the procedure of sampling in the present case. It is contended by the applicant that the law on drawing of samples as expounded in Standing Order No. 1/88 has been contravened by the prosecution. The relevant portion of Standing Order No. 1/88 is stipulated hereunder:

> *"**1.4** If the drugs seized are found in packages/containers the same should be serially numbered for purposes of identification. In case*

the drugs are found in loose form the same should be arranged to be packed in unit containers of uniform size and serial numbers should be assigned to each package/container. Besides the serial number the gross and net weight, particular of the drug and the date of seizure should invariably be indicated on the packages. In case sufficient space is not available for recording the above information on the package, a Card Board label, should be affixed with a seal of the seizing officer and on this Card Board label, the above details should be recorded.

1.5 Place and time of drawal of sample

Samples from the Narcotic Drugs and Psychotropic Substances seized, must be drawn on the spot of recovery, in duplicate, in the presence of search (Panch) witnesses and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.

1.6 Quantity of different drugs required in the sample

The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium, Ganja and Charas/Hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

1.7 Number of samples to be drawn in each seizure case

(a) In the case of seizure of single package/ container one sample in duplicate is to be drawn. Normally it is advisable to drawn one sample in duplicate from each package/ container in case of seizure of more than one package/ container.

(b) However, when the package/ container seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by U.N. kit, conclusively indicating that the packages are identical in all respect/ the package/ container may be carefully bunched in lots of 10 packages/ containers may be bunched in lots of 40 such packages such packages/ containers. For each such lot of packages/ containers, one sample in duplicate may be drawn.

(c) Where after making such lots, in the case of Hashish and Ganja, less than 20 packages/ containers remains, and in case of

other drugs less than 5 packages/ containers remain, no bunching would be necessary and no samples need be drawn.

(d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hashish, one more sample in duplicate may be drawn for such remainder package/ containers.

(e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/ container of that lot and mixed together to make a composite whole from which the samples are drawn from that lot.

1.8 Numbering of packages/containers

Subject to the detailed procedure of identification of packages/containers, as indicated in para 1.4 each package/container should be securely sealed and in identification slip pasted/attached on each one of them at such place and in such manner as will avoid easy obliteration of the marks and numbers on the slip. Where more than one sample is drawn, each sample should also be serially numbered and marked as S-I, S-2, S-3 and so on, both original and duplicate sample. It should carry the serial number of the packages and marked as P-1,2,3,4 and so on"

(emphasis supplied)

66. The applicant is alleging non-compliance of standard encapsulated in paragraph 1.7(a) of the Standing Order No. 1/88. The same provides that it is advisable to draw a sample from each packages/container in case of seizure of multiple packages/containers.

67. In the present case only 2 samples were taken out from the 23 bricks (3 red ice bricks; 6 rajdhani bricks; and 14 bricks with nothing written on them) recovered from co-accused Barun and 10 bricks (3 bricks with 'mato' written on them; and 7 bricks with 'brown' written on them) recovered from the applicant. It is the case of the applicant that the sample ought to have been taken from each type of brick that was recovered from the accused persons and five samples should have

been sent to FSL- (1) one from the 3 red ice bricks; (2) one from the 6 rajdhani bricks; (3) one from 14 bricks with nothing written on them; (4) one from the 3 bricks with 'mato' written on them; and one from the 7 bricks with 'brown' written on them.

68. The primary question that is to be considered is whether the compliance of Standing Order No. 1/88 issued under the ambit of Section 52A of the NDPS Act is to be necessarily followed while drawing samples and whether the same mandates strict compliance or not.

69. At the outset, before discussing the precedents on this issue, it is relevant to note that while the applicant has restricted his objection to non-compliance of Standing Order No. 1/88, almost *pari materia* provisions are found in Standing Order No.1/89 for sampling. The relevant portion of the same is reproduced hereunder:

> *"**SECTION (II) - GENERAL PROCEDURE FOR SAMPLING, STORAGE, ETC.***
>
> *2.1. All drugs shall be properly classified, carefully, weighed and sampled on the spot of seizure.*
>
> *2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witness (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.*
>
> *2.3. The quantity to be draw in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in cases of opium, ganja and charas (hasish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be*

well mixed to make it homogeneous and representative before the sample (in duplicate) is draw.

2.4. In the case of Seizure of a single package/container, one sample (in duplicate) shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.

2.5. However, when the packages/containers seized together are of identical size and weight, bearing identical markings and the content of each package given identical results on color test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of 10 packages/containers/except in the case of ganja and hashish (charas), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (in duplicate) may be drawn.

2.6. Whereafter making such lots, in the case of hashish and ganja, less than 20 packages/containers remain, and in the case of other drugs, less than 5 packages/containers remain, no bunching will be necessary and no sample need to be drawn.

2.7. If such remainders are more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such a reminder package/container.

2.8. While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative sample are in equal quantity is taken from a package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

2.9. The sample in duplicate should be kept in heat sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should bear the S. No. of the package(s)/containers from which the sample has - been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope which should also be sealed and marked 'secret-drug sample/Test memo' is to be sent to the chemical laboratory concerned.

3.0 The Seizing officers of the Central Government Departments, viz., Customs. Central Excise, Central Bureau of Narcotics, Narcotics Control Bureau, Directorate of Revenue Intelligence etc. should dispatch samples of the seized drugs to one of the Laboratories of the Central Revenues Control Laboratory nearest to their office depending upon the availability of test facilities. The other Central Agencies like BSF, CBI and other Central Police Organizations may send such sample to the Director, Central Forensic Laboratory, New Delhi. All State Enforcement Agencies may send samples of seized drugs to the Director/Deputy Director/Assistant Director of their respective State Forensic Science Laboratory.

3.1 After sampling, detailed inventory of such packages/containers shall be prepared for being enclosed to the panchanama. Original wrappers shall also be preserved for evidentiary purposes."

(emphasis supplied)

Nature of Standing Orders

70. The Hon'ble Apex Court in the case of ***Union of India vs Bal Mukund* : (2009) 12 SCC 161**, observed as under:

"10. The manner in which a sample of narcotic is required to be taken has been laid down by the Standing Instruction No. 1/88, the relevant portion whereof reads as under:

"e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/ container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot."

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39. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction No. 1/88, which had been issued under the Act, lays down the procedure for taking samples. The High Court has noticed that PW-7 had taken samples of 25 grams each from all the five bags and then mixed them and sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. ***It was a requirement in law****."*

(emphasis supplied)

71. The Hon'ble Apex Court in the case of ***Noor Aga v. State of Punjab* : (2008) 16 SCC 417,** observed as under:

> *"91.* ***The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact.*** *Clearly, there has been no substantial compliance with these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution."*
>
> (emphasis supplied)

72. The Hon'ble Apex Court in the case of ***Khet Singh v. Union of India*: (2002) 4 SCC 380** had observed that the standing instructions are intended to guide the officers to ensure fair investigation. The relevant portion of the same is reproduced hereunder:

> *"**10. The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer-in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer-in-charge of the investigation.** It is true that when a contraband article is seized during investigation or search, a seizure mahazar should be prepared at the spot in accordance with law. There may, however, be circumstances in which it would not have been possible for the officer to prepare the mahazar at the spot, as it may be a chance recovery and the officer may not have the facility to prepare a seizure mahazar at the spot itself. If the seizure is effected at the place where there are no witnesses and there is no facility for weighing the contraband article or other requisite facilities are lacking, the officer can prepare the seizure mahazar at a later stage as and when the facilities are available, provided there are justifiable and reasonable grounds to do so. In that event, where the seizure mahazar is prepared at a later stage, the officer should indicate his reasons as to why he had not prepared the mahazar at the spot of recovery. If there is any inordinate delay in preparing*

the seizure mahazar, that may give an opportunity to tamper with the contraband article allegedly seized from the accused. There may also be allegations that the article seized was by itself substituted and some other items were planted to falsely implicate the accused. To avoid these suspicious circumstances and to have a fair procedure in respect of search and seizure, it is always desirable to prepare the seizure mahazar at the spot itself from where the contraband articles were taken into custody.

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14. *In* ***State of H.P. v. Pirthi Chand*** *[(1996) 2 SCC 37 : 1996 SCC (Cri) 210] it was held that it would thus be settled law that* ***every deviation from the details of the procedure prescribed for search does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search irrelevant evidence nor the discovery of the fact inadmissible at the trial. Weight to be attached to such evidence depends on facts and circumstances in each case****. The court is required to scan the evidence with care and to act upon it when it is proved and the court would hold that the evidence would be relied upon.*

15. *In* ***Radha Kishan v. State of U.P****. [AIR 1963 SC 822 : (1963) 1 Cri LJ 809] this Court held that the* ***evidence obtained by illegal search and seizure would not be rejected but requires to be examined carefully.*** *In State of Maharashtra v. Natwarlal Damodardas Soni [(1980) 4 SCC 669 : 1981 SCC (Cri) 98] it was held that even if the search was illegal, it will not affect the validity of the seizure and further investigation of the authorities or the validity of the trial which followed on the complaint by the customs officials.*

16.Law on the point is very clear that even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and the court would consider all the circumstances and find out whether any serious prejudice had been caused to the accused. If the search and seizure was in complete defiance of the law and procedure and there was any possibility of the evidence collected likely to have been tampered with or interpolated during the course of such search or seizure, then, it could be said that the evidence is not liable to be admissible in evidence*."*

(emphasis supplied)

73. From the aforesaid judgements it is clear that substantial compliance of the Standing Orders is a requirement of law and is to be insisted upon to maintain the sanctity of the samples of the seized contraband.

74. Another aspect that is relevant to note is that Standing Order No. 1/88 and Standing Order No. 1/89 were issued by the Central Government in exercise of the power under Section 52A(1) of the NDPS Act. As discussed above, the provision of Section 52A of the NDPS Act applies in regard to the disposal of the seized contraband. The manner of mixing the samples is provided for the purpose of filing an application under Section 52A of the NDPS Act and for the disposal of the contraband.

75. Section 52A of the NDPS Act prescribes the procedure for disposal of seized narcotic drugs and psychotropic substances and the same, in no manner, lays down the procedure for search of the accused and the resultant seizure of the contraband. As discussed above, the Standing Orders issued by the Government from time to time, while exercising power under Section 52A of the NDPS Act, though are a requirement of law which need to be substantially complied with, however, the intent and the provisions thereof, in the opinion of this Court, cannot be imported in the procedure for search and seizure at the time of investigation. As noted in Paragraph 54 above, the said aspect has been clarified by the Hon'ble Apex Court in ***State of Punjab v. Makhan Chand*** (*supra*).

76. Be that as it may, as noted in ***Khet Singh v. Union of India*** (*supra*), even if it is to be accepted that there is some deviation in the sampling of contraband, there can be circumstances that justify the deviation from the procedure. The same alone will not render the seizure inadmissible. Whether there was any possibility of the evidence being tampered with or any serious prejudice is caused to the applicant is to be seen during the course of the trial.

Effect of non-compliance at the stage of bail

77. The applicant has placed reliance on the judgment in the case of ***Santini Simone v. Department of Customs*** **: 2020 SCC OnLine Del 2128**, where a Coordinate Bench of this Court had acquitted the accused person therein after considering the *dictum* in a catena of cases that have also been referred by the applicant herein in support of his contentions. The relevant portion of the aforesaid judgment is reproduced hereunder:

> "***57.*** *In* ***Sumit Tomar v. State of Punjab, (2013) 1 SCC 395****, the Court was examining the case where according to the prosecution, two plastic bags containing 'bhooki' opium powder were recovered from the dickey of the car. The contents of both the bags were mixed and two samples of 250 grams each were taken out. The remaining contraband weighing 69.5 kgs were sealed in two bags and the samples were sent to Forensic Science Laboratory for examination. It was contended on behalf of the appellant that the procedure followed by the concerned seizing officials was irregular and the alleged contraband could not be mixed and the samples taken thereafter.* ***It was contended that since the punishment is based on the quantity of contraband recovered, mixing of substances from two bags was unacceptable. The said contention was rejected.*** *The Court held that merely because different punishments have been prescribed depending on*

quantity of the contraband, the same has not caused any prejudice to the appellant. ***The Court reasoned that even after taking two samples of 250 grams each, 69.5 kgs of contraband was still available.***

58. *In* ***Amani Fidel Chris*** *(supra), four brown colour packets were allegedly recovered. The said packets contained powdery substances, which on being tested, yielded a positive result for heroin. The substances were then mixed properly and weighed with the help of an electronic machine and it was found that the same weighed 1.5 kgs. Thereafter, two samples of 5 grams each were drawn from the recovered substance and put into zip lock pouches. It was contended that the procedure adopted was not permissible. The procedure of transferring the contents of all four packets into one and then drawing a sample from the mixture had caused a serious prejudice, as it could not be ascertained whether the four packets contained the alleged narcotic. The Court found that the procedure adopted fell foul of the Standing Order No. 1/88 dated 15.03.1988 issued by the Narcotics Control Bureau (which was parimateria to Standing Order 1/1989 dated 13.06.1989, issued by Department of Revenue, Ministry of Finance, Government of India).* ***The Court held that where more than one container/package is found, it is necessary that samples be drawn from each separate container/package and be tested with a field-testing kit. If the container/packages are identical in shape, size and weight then lots of 10 or 40 container/packages may be prepared. Thereafter, representative samples from each container/package be drawn.***

59. *In* ***Basant Rai*** *(supra), a Coordinate Bench of this Court considered a case where the accused was allegedly found carrying a polythene bag, containing eight smaller polythene bags, containing a brown colour substance, which was alleged to be charas. The Investigating Officer had taken small pieces from each packet and mixed the same and thereafter, drawn two samples which were sent to FSL for analysis. The Court found fault with the said procedure and allowed the appeal. The Court held as under:*

"25. After hearing both the learned counsel for parties and going through the Trial Court Record, I find force in the submission of learned counsel for appellant. Admittedly, the samples were drawn after breaking small pieces from 08of the polythene bags which were allegedly kept in a green coloured bag by the appellant in his right hand. The IO prepared two samples of 25 grams each after taking a small quantity from each of the slabs.

26. Though the settled law is that if it is not practicable to send the entire quantity then sufficient quantity by way of samples from each of the packets of pieces recovered should be sent for chemical examination. Otherwise, result thereon, may be doubted.

27. For example, if the 08 packets were allegedly recovered from the appellant and only two packets were having contraband substance and rest 6 packets did not have any contraband; though all maybe of the same colour, when we mix the substances of all 8 packets into one or two; then definitely, the result would be of the total quantity and not of the two pieces. Therefore, the process adopted by the prosecution creates suspicion. In such a situation, as per settled law, the benefit thereof should go in favour of the accused. It does not matter the quantity. Proper procedure has to be followed, without that the results would be negative."

60. *In* ***Edward Khimani Kamau*** *(supra), a Coordinate Bench of this Court rejected the procedure where the substance found in nine packets was transferred into one packet and two samples were drawn from the same.* ***The Court held that it could not be ascertained that all nine packets contained heroin.***

61. *In* ***Charlse Howell @ Abel Kom*** *(supra), the NCB had allegedly recovered 330 grams of heroin. The powder recovered was packed in 166 polythene strips, which were concealed in the laces/hem of two lehengas. The concealed powder from the 166 strips was collected in a transparent polythene and on weighing, it was found to be 330 grams. Two samples of five grams were drawn and put separately in zip lock polythene pouches.* ***A Coordinate Bench of this Court following the decision of the Supreme Court in Union of India v. Bal Mukund, (2009) 12 SCC 161, held that the procedure adopted was not in conformity with the Standing Order 1/88 dated 15.03.1988, issued by the Narcotics Control Bureau.***

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67. *The entire purpose of drawing a sample and testing the same is to establish the composition of the substance from which the sample is drawn. Keeping this object in view, it must be ensured that the sample is a true representative of the substance recovered, before it can be assumed that the composition of the sample is the same as that of the recovered substances.*

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73…*The print out of the test result would indicate the number of tests conducted. If the contents of each of the packet was tested*

separately, there would be four such print-outs or one print-out recording the result of four such tests. However, the print out in question has not been brought in evidence, even though it is stated that it was in the possession of PW-4. It is also material to note that it is not the prosecution's case that any heroin was recovered from the appellant. The CRCL test result also does not disclose any presence of heroin in the sample sent for analysis. But the alleged test had also returned a positive result for heroin.

74. *In view of the above, this Court is unable to accept that the prosecution has established that the contents of each of the four packets that were allegedly recovered, were tested and found to be charas prior to the contents of the said packets being placed together.*

75. *Although PW-4 had stated in his cross-examination that the representative samples were drawn from the recovered substance after homogeneously mixing the same, it is obvious that no such homogeneous mixture was made. The substance in each of the four packets was allegedly a "hardened substance". It also appears that the same was in the form of a spherical balls.* ***There is no evidence to indicate that the said hardened substance from each of the four packets was crushed and then mixed together.***

76… Considering that the substance was a hardened substance, there could be no question of mixing them to obtain a homogeneous mixture; placing four balls (or for that matter a number of spheres) together does not amount to creating a homogeneous mixture*."*

(emphasis supplied)

78. It is pointed out that a Coordinate Bench of this Court have extended the benefit of non-compliance of the Standing Orders to the accused therein and granted bail in the cases of ***Laxman Thakur v. State (Govt. of NCT of Delhi)*** *(supra)* and ***Kashif v. Narcotics Control Bureau*** (*supra*). It is noted in the aforesaid cases that once it is noted that the Standing Instruction 1/88 is a "requirement of law" as held by the Hon'ble Apex Court in ***Union of India v. Bal Mukund*** (*supra*), the non-compliance of the same would cause serious

prejudice to the applicant. It is observed that once the collection of the sample is held to be faulty, the rigours of Section 37 of the NDPS Act would not be applicable.

79. It is pertinent to note that in ***Laxman Thakur v. State (Govt. of NCT of Delhi)*** (*supra*) and ***Kashif v. Narcotics Control Bureau*** (*supra*), the Court had placed reliance on the judgments in criminal appeals, that is, ***Santini Simone v. Department of Customs*** (*supra*) and ***Union of India v. Bal Mukund*** (*supra*).

80. The applicant also placed reliance on the judgment in the case of ***Ram Bharose v. State (Govt. of NCT of Delhi)*** **: Bail Appln. 1623/2022** where this Court granted bail to the accused therein as drawing of the samples did not appear to be in consonance with the Standing Operating Procedure in Standing Order No. 1/88 as per the contents of the FIR.

81. Similarly, relying upon ***Kashif v. Narcotics Control Bureau*** (*supra*), this Court in ***Amina v. State NCT of Delhi*** (*supra*), was dealing with a case where all pudiyas of contraband were mixed in a jar violating Standing Order No.1/88. The Court observed that the sample was not representative and its composition was likely to vary significantly and the same was a reasonable ground to doubt the accused person's guilt.

82. Bail was granted by this Court where the sampling procedure followed by the prosecution was not in conformity with the Standing Orders on the basis of similar observations in ***Gurpreet Singh v. State of NCT of Delhi*** (*supra*), ***Sarvan v. State Govt. of NCT of Delhi*****:**

Bail Appln. 2781/2022, ***Sandeep @ Chiku v. State (NCT of Delhi)*** **: 2024:DHC:528** and ***Ginkala Meddilety v. the State*** **: Bail Appln. 1133/2022**.

83. The prosecution has primarily argued that the procedural lapses have to be determined during the course of the trial and not in a proceeding for grant of bail. They have relied on a judgment of a Coordinate Bench of this Court in ***Shaildender v. State NCT of Delhi*****: Bail Appln. 3508/2021**.

84. The prosecution has also relied on the judgment of the Hon'ble Apex Court in the case of ***State of Punjab v. Balbir Singh*** **: 1994 3 SCC 299** where it was held that while officers cannot totally ignore the provisions under NDPS Act, mere non-compliance will not vitiate the prosecution. It was held that prejudice caused by the non-compliance would have to be shown by the accused and alternatively, the prosecution would need to give a proper explanation for non-compliance, without which the non-compliance will adversely effect the prosecution's case.

85. The State has also relied on ***Arvind Yadav in JC through his Parokar v. Government of NCT of Delhi*****: Bail Appln. 1416/2021** where it was held that non-compliance of Section 52A of the NDPS Act would not vitiate the trial.

86. The Court at this stage is seized with the limited question of whether the alleged non-compliance would entitle the applicant to bail. As pointed by the prosecution, most of the judgments relied upon

by the applicant are ones that are passed in criminal appeals or rely upon the *dictum* in criminal appeals.

87. In all these cases, it has been essentially held that in a situation of improper sampling, the onus is on the prosecution to establish that the seized substance is the contraband and in the absence of proper procedure being followed, the recovery would be deemed suspicious. The Courts have noted the irregularity in the procedure and discrepancies in the case of the prosecution to hold that the prosecution has not been able to prove the guilt of the accused beyond reasonable doubt.

88. The said question, in the opinion of this Court, can only be determined after the conclusion of the trial and it would be premature to comment on the same while considering the application for bail.

89. The second threshold under Section 37 of the NDPS Act which provides for grant of bail includes the hurdle of the Court having reasonable ground to believe that the applicant has not committed the offence. While the prosecution cannot be given undulated power where their version is treated as the gospel truth, unless ancillary facts suggest suspicious activity or tampering with the contraband, at the stage of consideration of bail, the benefit of an alleged procedural anomaly would not entitle the applicant to bail.

90. As noted above, Section 52A of the NDPS Act provides for disposal of the contraband. The aforementioned standing orders have been issued under the ambit of Section 52A of the NDPS Act itself. In such circumstances, where the actual seized sample has not been

disposed of, it will be open to the prosecution to prove the recovery through the actual contraband as well.

91. It has been observed by the Courts on numerous occasions that the police officials fail to strictly adhere to the minute intricacies of the mandate of the standing instructions. Even though the same shows an abysmal state of affairs, this Court is of the opinion that accused persons cannot be allowed to go scot free on minute irregularities in procedure especially when the prosecution has the opportunity to furnish credible explanation.

92. *Prima facie*, prejudice caused to the applicant due to the procedural lapse is to be seen in such a case. The lapse should be such that it leaves no conclusion other than the trial being vitiated. Non-compliance of standing orders would, at best, cast suspicion over the veracity of the samples of the seized substance. The same can be overcome by the prosecution by producing evidence to the contrary.

93. Any observation to this effect, at this stage, would be premature. Infirmities in the procedure, if any, will be tested during the course of the trial.

94. This Court is thus not inclined to grant bail to the applicant on the ground of improper sampling.

Non-Joinder of Independent Witnesses and No Photography/ Videography

95. The learned counsel for the applicant has also raised the issue that no independent witness was joined by the prosecution even

though the co-accused was apprehended on the basis of secret information, and the applicant was apprehended later on the basis of his disclosure. It is argued that no independent witnesses were associated by the prosecution and no photography or videography was done by the prosecution in the present case despite the applicant being apprehended in a public place.

96. In the present case, secret information was received at about 8:55PM on 15.02.2021. It is the case of the prosecution that the raiding team reached near the Ramlila Maidan at about 9:40 PM and asked 5-7 people along the route to join the investigation, however, all of them left stating their compulsions. It is stated that another attempt was made after reaching the spot to include passers-by in the investigation, however, they left as well. It is stated in the FIR that no notice could be served to the said individuals due to lack of time. Around 11 PM, the co-accused was spotted and subsequently apprehended. Subsequently, the applicant was apprehended at the instance of the co-accused.

97. This Court in the case of ***Bantu v. State Govt of NCT of Delhi*****: 2024: DHC: 5006** has observed that while the testimony of independent witness is sufficient to secure conviction if the same inspires confidence during the trial, however, lack of independent witnesses in certain cases can cast a doubt as to the credibility of the prosecution's case.

98. It was held that when the Investigating Agency had sufficient time to prepare before the raid was conducted, not finding the public

witness and lack of photography and videography in today's time casts a doubt to the credibility of the evidence.

99. In the present case, no notice under Section 100 (8) of the CrPC was given to any person on the refusal to support the Investigating Agency during the search procedure. The secret information was received almost two hours prior to the co-accused being apprehended. It is peculiar that the Investigating Agency was unable to associate even a single public witness in the same time, especially since the prosecution had prior secret information and the applicant and co-accused were apprehended at a public place.

100. This Court in ***Bantu v. State Govt of NCT of Delhi*** (*supra*), noted that the Hon'ble Apex Court, way back in the year 2018 in ***Shafhi Mohd. v. State of H.P.*** (*supra*), after taking note of the technological advancements, had passed certain directions. The Hon'ble Apex Court had emphasised the role of audio-visual technology in enhancing the efficacy and transparency in the Police investigations.

101. This Court also noted that realising the need of change in time, the Legislature has now passed the Bharatiya Nagarik Suraksha Sanhita, 2023 ('**BNSS**'), where the practice of photography and videography has now been made mandatory as part of the investigation.

102. This Court also noted that the procedure prescribed in NCB Handbook which has been adopted by the Delhi Police may be argued to be not binding, however, it cannot be denied that the same has been

prescribed as the best and crucial practice for obtaining evidence in order to avoid the allegation in regard to foul play.

103. Thus, while it is true that the effort, if any, made by the prosecution to have the search conducted in the presence of the independent witnesses would be tested during the course of trial and the same may not be fatal to the case of the prosecution, however, the benefit, at this stage, cannot be denied to the accused.

Delay In Trial

104. In the present case, the matter is at the stage of examination of prosecution evidence. It is stated that only two out of the twenty prosecution witnesses have been examined till now. The applicant has been in custody since 18.02.2021.

105. It is trite law that grant of bail on account of delay in trial cannot be said to be fettered by the embargo under Section 37 of the NDPS Act. The Hon'ble Apex Court, in the case of ***Mohd. Muslim v. State (NCT of Delhi)*** (*supra*) has observed as under:

> *"**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 country[20]. 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. State[21] 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 1940[23]). 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.*"

(emphasis supplied)

106. The Hon'ble Apex Court in ***Rabi Prakash v. State of Odisha*** **: 2023 SCC OnLine SC 1109**, while granting bail to the petitioner therein held as under :

"4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent - State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent

more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act."

107. The Hon'ble Apex Court in ***Badsha SK. v. The State of West Bengal*** (order dated 13.09.2023 passed in **Special Leave Petition (Crl.) 9715/2023**), granted bail to the petitioner wherein who had been in custody for more than two years with the trial yet to begin.

108. Similarly, in ***Man Mandal & Anr. v. The State of West Bengal*** **(**order dated 14.09.2023 passed in **Special Leave Petition (Crl.) 8656/2023** decided on 14.09.2023), the petitioner therein had been in custody for almost two years and the Court found that the trial is not likely to be completed in the immediate near future. The petitioner was, therefore, released on bail.

109. In ***Dheeraj Kumar Shukla v. State of U.P. 2023*** **: SCC OnLine SC 918**, the Hon'ble Apex Court released the petitioner therein on bail, and observed as under:

"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."

110. A Coordinate Bench of this Court in ***Gurpreet Singh v State of NCT of Delhi*** (*supra*), considered the effect of delay and observed as under:

> "*16. In addition to the above, only 2 (two) out of 22 witnesses have been examined by the prosecution, and that too partially, though more than three and a half years have passed since the arrest of the applicant. It may be true that the reason for the delay in the conclusion of the trial may be for various factors, may be not even attributable to the prosecution, like Covid 19 pandemic and restricted function of the Courts, however, as long as they are not attributable to the applicant/accused, in my view, the applicant would be entitled to protection of his liberty under Article 21 of the Constitution of India. Delay in trial would, therefore, be one of the consideration that would weigh with the Court while considering as application filed by the accused for being released on bail.*"

111. From the foregoing, it is evident that despite the stringent requirements imposed on the accused under Section 37 of the NDPS Act for the grant of bail, it has been established that these requirements do not preclude the grant of bail on the grounds of undue delay in the completion of the trial.

112. Various courts have recognized that prolonged incarceration undermines the right to life, liberty, guarantee under Article 21 of the Constitution of India, and therefore, conditional liberty must take precedents over the statutory restrictions under Section 37 of the NDPS Act.

113. In the present case, the trial is likely going to take long. Speedy trial in such circumstances does not seem to be a possibility. The

applicant cannot be made to spend the entire period of trial in custody especially when the trial is likely to take considerable time.

CONCLUSION

114. In view of the aforesaid discussion, this Court is of the opinion that the applicant has made out a *prima facie* case for grant of bail on the ground of absence of independent witnesses, no photography or videography of the recovery and prolonged delay in the trial.

115. In the present case, the prosecution has been given an adequate opportunity to oppose the present application. In view of the facts of the case, *prima facie*, this Court is of the opinion, that at this stage, there are reasonable grounds to believe that the applicant is not guilty of the alleged offence. Moreover, it is also not disputed that the applicant has clean antecedents, and is thus not likely to commit any offence whilst on bail.

116. However, keeping in mind the fact that the applicant is a foreigner, appropriate conditions have to be imposed while granting bail.

117. The applicant is, therefore, directed to be released on bail on furnishing a personal bond for a sum of ₹1,00,000/- with two sureties of the like amount, subject to the satisfaction of the learned Trial Court, on the following conditions:

a. The applicant shall join and cooperate with the investigation as and when directed by the IO;

b. The applicant will not leave the boundaries of Delhi without prior permission of the Court, and will deposit his passport with the learned Trial Court;

c. The applicant shall provide the details of his permanent address to the learned Trial Court and intimate the Court, by way of an affidavit, as well as the IO about any change in his residential address;

d. The applicant shall, upon his release, give his mobile number to the concerned IO/SHO and shall keep his mobile phone switched on at all times;

e. The applicant shall appear before the learned Trial Court on every date of hearing;

f. The applicant shall, after his release, appear before the concerned IO/SHO once in every week;

g. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;

h. The learned Trial Court is directed to ensure that the certificate of assurance, from the Embassy/ High Commission of the applicant's native country, that is, Nepal, that the applicant shall not leave the country and shall appear before the learned Trial Court as and when required, is placed on record.

118. In the event of there being any FIR/DD entry / complaint lodged against the applicant, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

119. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not influence the outcome of the Trial and also not be taken as an expression of opinion on the merits of the case.

120. The bail application is allowed in the aforementioned terms.

AMIT MAHAJAN, J

JULY 08, 2024