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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 20.04.2023

Judgment pronounced on: 22.05.2023

+ **BAIL APPLN. 3718/2022**

TAMIR ALI

..... Petitioner

Through: Mr. Aditya Aggarwal, Ms. Kajol
Garg, Mr. Naveen Panwar, Adv.

versus

NARCOTICS CONTROL BUREAU

..... Respondent

Through: Mr. Utsav Singh Bains, SPP with Mr.
Sunil Kumar, Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

1. This is an application seeking bail in respect of case being Crime No. VIII/19/DZU/2022, under section 8/22(c)/23(c)/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS").

FACTUAL MATRIX

2. On the basis of secret information, Narcotics Control Bureau (hereinafter "NCB") constituted the team and reached the office of DHL Express Pvt. Ltd., Kirti Nagar, New Delhi where parcel bearing AWB No. 7702909491 was lying suspected to contain psychotropic substances. The said parcel was opened and found total 13,200 strips of Tramadol tablets hidden in 11 lace rolls. The panchnama was prepared on the spot i.e.,

24.02.2022. The contraband was seized, sealed and deposited in the Malkhana on 24.02.2022.

3. On 24.02.2022, during the course of enquiry from the owner of the DHL office, it was informed that said parcel was booked through a firm OGS Groups by one of the accused, Ganesh Chaudhary who was arrested on 25.02.2022. He disclosed that the said parcel was booked on the IDs of Mr. Nishu Bhatnagar for one Tamir Ali i.e., Applicant belonging to Lucknow.

4. On 04.03.2022, the accused Ganesh Chaudhary tendered another statement wherein he disclosed that he booked the parcels of NRx tablets to USA on the directions of the Applicant i.e, Tamir Ali and Kashif, both resident of Lucknow.

5. NCB team reached Lucknow to arrest the Applicant who was apprehended near Transport Nagar Metro Station, Lucknow on 06.03.2022 on identification by Ganesh Chaudhary.

6. On the Applicant's disclosure statement tendered on 06.03.2022, he named three of his associates namely Kashif, Mohd Rizwan Siddiqui @ Shaan and Mohd Zahid Khan, but all three had left for Shimla and would return to Lucknow via Delhi on 06.03.2022. NCB constituted the team and all were intercepted near Jewar Toll Plaza. He further revealed that he used to procure illegal NRx tablets from Mohd Rizwan Siddiqui@ Shaan and Mohd Zahid Khan and thereafter, he packed these drugs into lace rolls and food items. These packed items were sent to Accused Ganesh Chaudhary to send these parcels to USA.

7. On the disclosure statement of Ganesh Chaudhary, two other parcels were seized on 28.02.2022 and 02.03.2022 in which 15,000 Zolpidem tablets and 19,440 Tramadol tablets were recovered respectively.

CONTENTIONS

8. The learned counsel for the applicant has made the following submissions:

- i. He stated that the name of the Applicant surfaced from the disclosure statement of the co-accused Ganesh Chaudhary, which is not admissible as per the Apex Court's judgment of *Tofan Singh vs. State of Tamil Nadu, (2021) 4 SCC 1*.
- ii. The learned counsel strongly places reliance on the Standing Order 1/88 in the context of drawing of samples. He contends that neither seizure memo nor sampling was done at the spot where the alleged recovery was done. He relies on Clause 1.5 of the Standing Order 1/88 which reads as under:

*“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 mention to this effect should invariably be made in the panchnama drawn on the spot.”*

- iii. Learned counsel further contends that there is no explanation on the part of delay in making application under section 52A of NDPS Act for sampling before the Magistrate. There is no explanation for the inordinate delay by the respondent. The last seizure memo was prepared on 02.03.2022, but the application for drawing the sample under section 52A before Magistrate was made on 22.04.2022 i.e. after an inordinate delay of 51 days. Reliance in this regard in

placed on *Union of India v. Mohanlal*, (2016) 3 SCC 379 wherein the Apex Court opines that the application to the Magistrate for sampling has to be moved immediately after seizure.

- iv. He further submits that samples were sent to FSL only on 18.08.2022, while Clause 1.13 of Standing Order 1/88 states that samples have to be sent to FSL within 72 hours from the date of seizure. The said clause reads as under:

*“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.”*

- v. Relying on the Supreme Court’s decision in *Noor Aga v. State of Punjab &Anr.* in CRIMINAL APPEAL NO. 1034 OF 2008, (2008) 16 SCC 417, the learned counsel states that guidelines in the Standing Order cannot be flouted and should be substantially complied with.
- vi. It is submitted that the sampling procedure was vitiated. He relies on the judgment of Hon’ble Supreme Court in *Gaunter Edwin Kircher v. State of Goa, Secretariat Panaji, Goa (AIR 1993 SC 1456)* in which it was stated that sample from the seized contraband has to be taken from each packet/lace roll whereas, in the present case sample was not taken from each lace roll.

vii. Lastly, he states that there is no whisper in the entire complaint of 'source' from where these tablets were procured by the Applicant and/or co-accused persons. No recovery has been effected from the Applicant and no evidence has been brought forth to show direct money transactions between the Applicant, co-accused, Ganesh Chaudhary and/or overseas customers.

9. Opposing the bail application, Mr. Bansal, learned counsel for the NCB made the following contentions:

- i. He states from a perusal of Section 52A of NDPS Act, one finds that there is no mention of a time frame within which the application has to be made before the Magistrate for sampling. Relying on the judgment of *Mohanlal (supra)*, he states that the Hon'ble Supreme Court categorically declined to define any time frame within which the application has to be made before the Magistrate under Section 52A.
- ii. He further contends that seized contraband were duly submitted to the godown in a sealed form and that there was no tampering with the same.
- iii. He states that no prejudice has been caused to the Applicant for delay in filing an application under section 52A of NDPS Act. Furthermore, he states that the Applicant is barred from raising this issue today as the applicant at that point in time raised no objection to collection of sample.
- iv. He strongly places reliance on the judgment of this court in *Arvind Yadav In JC Through His Pairokar v. Govt Of NCT Delhi*

Through Standing Counsel in BAIL APPLN. 1416/2021 (2021:DHC:1965) wherein it was held:

“13. By this petition, petitioner seeks bail on the ground of noncompliance of Section 52A of the NDPS Act, however, in view of the fact that the trial does not stand vitiated by drawing the samples at the spot in the absence of a Magistrate for being sent to FSL analysis for filing a appropriate charge-sheet before the Special Court for ascertaining the nature of contraband and whether the sanctity of drawing the samples was vitiated for the non-presence of the Magistrate would be an issue to be seen during the course of trial, hence this Court finds no ground to grant bail to the petitioner on this ground.”

ANALYSIS

10. I have heard learned counsel for the parties.

11. The learned counsel for the Applicant has restricted his submissions to violation of Standing Order 1/88 and Section 52A NDPS for delay in making an application to the Magistrate for drawing the sample.

12. Thus, the issue before this court for consideration is whether the Standing Order 1/88 and Section 52A NDPS stands violated in the present case? If yes, what is a reasonable time for filing an application before the Magistrate under section 52A?

13. I have already in a connected matter, ***Kashif v. Narcotic Controls Bureau*** in Bail Appln. 253/2023 (2023:DHC:3438) held that the ambiguity

between Standing Order 1/88 and Section 52A is to be resolved through a harmonious reading of the two. Application under section 52A should be made within reasonable time for certification and drawing of sample. The relevant paras read as under:

“15. The aforesaid discussion makes it clear that Section 52A NDPS does not give a time frame within which application has to be made for collection of sample to the magistrate. The time frame is provided in Standing Order 1/88 and that too, only in the context of sending the sample to FSL.

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18. In Mohanlal (supra), the Hon'ble Supreme Court in para 19 has opined that “...The scheme of the Act in general and Section 52A 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...”. What is reasonable has been left open by the Apex Court in the said judgment.

19. It cannot be the intent of the legislature that since no time limit is mentioned in the statute, the respondent authorities can take their own sweet time in moving an application under section 52A NDPS. Rather, the said application should be moved at the earliest to prevent the apprehension of tampering with the samples as the seizure, quantity and quality of contraband is the most crucial evidence in NDPS cases and drawing of sample and certification in the presence

of magistrate is of utmost importance.

20. Thus, a harmonious and combined reading of Standing Order 1/88 and Section 52A NDPS construes that a reasonable time must be read into section 52A(2) for making an application for drawing the sample and certification before the Magistrate.

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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.”

14. In the present case, the submission for the collection of a sample and the certification under section 52A of the NDPS Act was made on 22.04.2022, i.e., 51 days after the last seizure dated 02.03.2022.

15. The duration of 51 days cannot be considered a reasonable time period for submitting an application under section 52A NDPS for drawing of sample.

16. Though the court in *Arvind Yadav (supra)* held that the trial is not vitiated due to absence of Magistrate thereby violating section 52A, the same did not take into consideration whether the seized contraband is immune from tampering and mischief lying in the custody and possession of the Department for a long period of time.

17. A coordinate bench of this court in *Rishi Dev @ Onkar Singh v. State* (2008:DHC:1513) in CRL.A. No. 757/2000 explained the rationale behind a stringent time frame for sample collection by stating:

“8....The above passage shows that there is a time limit of 72 hours stipulated by the Narcotics Control Bureau for a seized sample to be deposited with the Chemical Examiner for testing. This rule is salutary because any attempt at tampering with the sample recovered from the accused can have fatal consequences to the case of the prosecution. Strict compliance has to be insisted upon in such an event.

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19. This Court is unable to agree with the approach adopted by the trial court, especially its observations highlighted above. The record of the case should contain entry in writing about the sample being sent for testing within the time specified by the Narcotic Control Bureau. A strict compliance of this requirement has to be insisted upon. The reason is this. The sample that is kept in a police malkhana, under the seals of

the police officers themselves, is still definitely under the control of those police officers. There is every possibility that the samples could be tampered and again re-sealed by the very same officers by again affixing their seals. It is to prevent this from happening that earlier the sample is sent for testing to the CFSL the better.” (emphasis supplied)

18. Relying on the aforesaid precedent, in the instant case, there is a reasonable apprehension of tampering with the seized contraband that was lying in the custody and control of the Department for 51 days. Additionally, the Respondent has failed to provide any justification for the delay of 51 days in filing the application under section 52A of the NDPS Act.

19. In light of the above discussion, I am of the view that there is violation of section 52A in the present case. The sample collection procedure stands vitiated due to unexplained delay of making an application to the Magistrate in a reasonable time period. The benefit of the said violation must accrue to the Applicant.

20. Although the applicant did not raise objections regarding delay in filing application under section 52A when the application was filed, but the same being a legal objection can be raised at any point during the subsequent bail application.

21. The applicant has been in custody since 07.03.2022 and over a year has elapsed since then. There is no need for any custodial interrogation of the applicant. Furthermore, no recovery was effected from the applicant or at his instance. As a result, the rigors of Section 37 of the NDPS Act do not apply to the applicant.

22. The triple test i.e., a) flight risk, b) tampering with evidence, and c) influencing witnesses, can be addressed by imposing strict conditions for bail.

23. For the aforesaid reasons, the application is allowed and the applicant is granted bail on the following terms and conditions:

- a. The Applicant shall furnish a personal bond and a surety bond in the sum of Rs. 25,000/- each, to the satisfaction of the Trial Court;
- b. The Applicant shall appear before the Court as and when the matter is taken up for hearing;
- c. The Applicant shall provide his mobile number to the Investigating Officer (IO) concerned, which shall be kept in working condition at all times. The Applicant shall not switch off, or change the same without prior intimation to the IO concerned, during the period of bail;
- d. The Applicant shall join investigation as and when called by the I.O. concerned;
- e. In case the Applicant changes his address, he will inform the I.O. concerned and this Court also;
- f. The Applicant shall not leave the country during the bail period and surrender his passport, if any, at the time of release before the Trial Court;
- g. The Applicant shall not indulge in any criminal activity during the bail period;
- h. The Applicant shall not communicate with or come into contact with any of the prosecution witnesses or tamper with the evidence of the case.

24. The observations hereinabove are only for the purposes of deciding the present bail application and shall not affect the merits of the case.
25. The application is disposed of in the aforesaid terms.
26. The written submissions and additional status report handed over in court are taken on record.

MAY 22, 2023 / jv

JASMEET SINGH, J

[Click here to check corrigendum, if any](#)

