

**Court No. - 28**

**Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 6298 of 2020

**Applicant :-** Chhotey Lal

**Opposite Party :-** U.O.I. N.C.B.

**Counsel for Applicant :-** Mohd. Salman, Anuj Dayal, Awadhesh Mishra, Manish Srivastava, Nasreen Bano, Pramod Kumar

**Counsel for Opposite Party :-** A.S.G., Akhilesh Awasthi, Sikha Sinha

**And**

**Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 1347 of 2022

**Applicant :-** Kavinder Kumar

**Opposite Party :-** Union Of India (NCB)

**Counsel for Applicant :-** Jay Kumar Soni, Ankit Kumar Trivedi, Anuj Dayal

**Counsel for Opposite Party :-** Akhilesh Kumar Awasthi

**Hon'ble Krishan Pahal, J.**

1. Since the above two bail applications of the accused-applicants pertain to common recovery, therefore, I am deciding these bail applications by a common judgment.

2. Heard Sri Anuj Dayal, learned counsel for applicants and Sri Akhilesh Kumar Awasthi, learned counsel for the N.C.B. and perused the record.

3. Applicants seek bail in Case Crime No.03 of 2020, under Sections 8(C)/18/29 of Narcotic of Drug and Psychotropic Substances Act, 1985, Police Station N.C.B., District Lucknow, during the pendency of trial.

**Facts in Brief:-**

4. As per prosecution story, on the secret information received by N.C.B. from a squealer on 20.02.2020, a team was constituted for

arresting the accused-persons, namely, Chhotey Lal and Kavinder Kumar, from general bogey of Train No.12237 Begumpura Express. The N.C.B. team intercepted the said accused-persons from the said general bogey on 20.02.2020 at 16.15 pm. Thereafter, apprehended accused-persons were taken at platform no.7 and 4 Kg and 3 Kg Opium was recovered respectively from Chhotey Lal and Kavinder Kumar being contained in their bags. The sample of 25 grams was taken from each packet and sealed. The sample of the said contraband was sent for forensic analysis on 23.02.2020 and was received in the Central Revenue Control Laboratory on 24.02.2020 and the report was prepared on 26.02.2020.

**Rival Contentions:-**

5. Learned counsel for the applicants has stated that out of seven samples received, there is a difference of weight in three samples, out of which, sample P2S1 and P6S1 are found to be of 22.2 grams and 21.6 grams respectively. Thus, they are found deficient of the requisite weight by 2.8 grams and 3.4 grams respectively.

6. On this count, learned counsel for the applicants has placed much reliance on the judgment of Supreme Court passed in case of ***Rajesh Jagdamba Avasthi vs. State of Goa***<sup>1</sup>. Relevant part of the judgment is quoted hereinasunder:-

*"14. We do not find it possible to uphold this finding of the High Court. The appellant was charged of having been found in possession of charas weighing 180.70 gm. The charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by the Junior Scientific Officer, PW 1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned counsel rightly submitted before us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelope A ignoring the quantity of charas found in envelope B. This is because there was only one search and seizure, and whatever was recovered from the appellant was packed in two envelopes. The credibility of the*

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1 (2005) 9 SCC 773

*recovery proceeding is considerably eroded if it is found that the quantity actually found by PW 1 was less than the quantity sealed and sent to him. As he rightly emphasised, the question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for chemical analysis to PW 1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful."*

7. Learned counsel for the applicants has further stated that as the quantity of each sample for chemical analysis should not be less than 24 grams in the case of Opium. The requisite directions provided in Standing Order 1/89 dated 13.06.1989 have not been followed and the applicants are entitled for bail on this ground only. As in the present case, two samples were found less than the minimum quantity of 24 grams.

8. Learned counsel for the applicants has placed reliance on the judgment of this Court passed in ***Criminal Appeal No.1821 of 1998 (Jai Pal and Another vs. State of U.P.) decided on 23.01.2018.*** Relevant part of the judgment is quoted hereinasunder:-

*"13. Firstly, it has to be seen whether it was necessary for prosecution to take weight of the recovered contraband substance and its sample or not. In this regard, learned counsel for the appellant has relied upon the Standing Order No. 1/89 para 2.3 of which provides as follows:*

*"2.3 The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the case of opium, ganja and charas (hashish) where 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 drawn."*

*15. This Court is of the opinion that the view of the learned A.G.A. is not tenable because under the Standing Instructions 1/88 issued by the Narcotics Drugs Bureau on 15.3.1988, though after the recovery made in the present case, provided for the mode to be adopted to take sample of the contraband, which prescribed the certain quantity to be taken out of the contraband. The Standing Order 1 of 89 dated 13.6.1989 issued by Government of India (supra) also prescribes that in case of opium not less than 24 Grams would be taken as sample from the recovered contraband. These Standing Orders and Instructions do indicate that from out of the recovered substance, the sample which was required to be taken must be weighed and the same is required to be collected on the*

*spot as early as possible unless there were such circumstances when it was not possible to collect the sample on the spot. It may also be taken into consideration that under the Old Act, Section 27 of the Act provided lesser punishment for illegal possession of small quantity of any Narcotic Drugs and Psychotropic Substance for personal consumption which would require weighing of the contraband substance. Under the provisions of the old Act the small quantity of opium was prescribed to be 5 grams. as per notification No. S.O. 827 (E) dated 4.11.1985 published in the Gazetted of India (Extra), Part 2 Section 3 (ii) dated 14.11.1985, pp. 2-3 issued by Ministry of Finance, Department of Revenue. Hence it will be supposed that the prosecution was duty bound to weigh the contraband substance allegedly recovered from the accused to know whether the recovered substance was small quantity or above that for determining whether he would be entitled for the benefit of small quantity for personal consumption. The record reveals that in recovery memo 75 grams. opium is alleged to have been found from the accused but no mention is made as to how the same was assessed to be 75 grams. as no weighing machine is recorded to have been called for, for its weighing nor the quantity of its sample is recorded therein. In this regard, P.W.1 has stated the same facts which have been mentioned in the recovery memo. In cross-examination this witness admitted that the weight of opium was recorded to be 75 gram on the basis of conjecture. Similarly P.W.2 has also repeated the same statement as is mentioned in the recovery memo, in examination-in-chief but even he has not disclosed as to how the same was weighed to be 75 grams. Both these witnesses have also not stated about weighing of the sample of the contraband also. It would also be pertinent to mention here that in the F.S.L. report also the quantity received of opium for being tested has not been recorded, hence, it cannot be held that the required minimum quantity of 24 gram was sent to them for being analysed which would also make the correctness of the said report to be doubtful."*

9. Learned counsel for the applicants has also placed much reliance on the judgment of this Court passed in ***Criminal Misc. Bail Application No.9660 of 2021 (Om Prakash Verma vs. State of U.P.) decided on 11.03.2022***, wherein it has been opined that the Standing Order and the other guidelines issued by the Authority having legal sanction are required to be complied by the Arresting Authorities. He has further submitted that the recovered contraband is slightly above on the side of commercial quantity as the commercial quantity of Opium is 2.5 Kg. He has also submitted that there are no criminal history of the applicants.

10. Learned counsel for N.C.B., Sri Akhilesh Kumar Awasthi has vehemently opposed the bail application on the ground that the

applicants are the perpetrator of the crime and a total of 7 Kg illegal Opium has been recovered from the conscious and constructive possession of the applicants, which is much more than commercial quantity. He has further stated that the mandatory provisions of Sections 50 and 57 have been religiously followed and after completing the investigation, a complaint was filed by the N.C.B. before the competent authority. He has further stated that the applicants are the residents of Jharkhand and were arrested from Charbagh Railway Station, Lucknow. He has further submitted that there are two independent witnesses of the recovery, namely, Rakesh Joshi and Sachin Kumar and the recovery has been undertaken in the present of Gazetted Officer Sujit Kumar Singh. Thus, the mandatory provision of Section 50 N.D.P.S. Act has been complied with. He has further stated that at the spot, test were conducted by D.D.T. Kit and it was found positive for Opium. He has further stated that C.D.R. analysis clearly shows the connection of the accused-applicants. He has further stated that the samples were taken and sent for chemical analysis on 23.02.2020 and was received at the F.S.L. on 24.02.2020 and the test was conducted on 16.03.2020 and the report was prepared on 26.05.2020, which is on record. There is complete compliance of the Standing Order 1/89 of the N.C.B. The minor difference in weight of two samples out of seven does not falsify the prosecution story.

11. Learned counsel has further stated that the case law referred to by learned counsel for applicant are not applicable to the present subject matter at this point of time, adjudication is for the purpose of bail only and we are not dealing with the order of conviction or acquittal. The recovered contraband is commercial in quantity. The accused persons are the residents of Jharkhand and there is nothing on record to suggest that they have been falsely implicated by the N.C.B. and there is nothing on record to suggest as to what animosity the N.C.B. had with the applicants and the another accused person. The

applicants are the resident of Jharkhand. There is no reason for their false implication, that too regarding a recovery of this magnitude.

12. Learned counsel for N.C.B. has placed reliance on the following judgments :-

1. ***Than Kunwar vs. State of Haryana***<sup>2</sup>
2. ***Ramesh Rana vs. State of U.P.***<sup>3</sup>
3. ***Union of India Through N.C.B. vs. Md. Nawaz Khan***<sup>4</sup>
4. ***Union of India vs. Mohanlal and another***<sup>5</sup>
5. ***State of Kerala vs. Rajesh***<sup>6</sup>
6. ***State of Punjab vs. Baljinder Singh***<sup>7</sup>
7. ***Sumit Tomar vs. State of Punjab***<sup>8</sup>
8. ***Union of India vs. Ram Samujh And another***<sup>9</sup>
9. ***Satpal Singh vs. State of Punjab***<sup>10</sup>
10. ***Khet Singh vs. Union of India***<sup>11</sup>
11. ***Dehal Singh vs. State of H.P.***<sup>12</sup>

13. It is also provided in Section 52(1) of NDPS Act, wherein it is provided that the sample from the contraband should be taken before a Magistrate. The sample in the present case has been taken before the concerned Magistrate and the same law has been settled by the Apex Court. The taking of the sample before a Magistrate rules out any kind of adulteration or interpolation in the collection of the sample.

14. The relevant portions of the judgment rendered by the Apex Court in ***Union of India vs. Mohanlal and another***<sup>13</sup> are as follows :-

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2. 2020 (5) SCC 260
  3. 2019 SCC Online All 4374
  4. AIR 2021 SC 4476
  5. (2012) 7 SCC 712
  6. AIR 2020 SC 721
  7. (2019) 10 SCC 473
  8. AIR 2012 SC 728
  9. (1999) 9 SCC 429
  10. (2018) 13 SCC 813
  11. 2002 CRI. L. J. 1832
  12. AIR 2010 SC 3594
  13. (2012) 7 SCC 712

**"12.** Section 52A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

*Section 52A: Disposal of seized narcotic drugs and psychotropic substances.*

*(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances 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.*

*(2) Where any narcotic drug or psychotropic substance 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 or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances 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 or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-*

*(a) certifying the correctness of the inventory so prepared; or*

*(b) taking, in the presence of such Magistrate, photographs of such drugs or substances 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) When 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 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn Under Sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.]*

**13.** It is manifest from Section 52A(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. 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. 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-section (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. 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."*

### **Conclusion:-**

15. The recovered contraband is heavy in quantity. There is compliance of the mandatory provision of N.D.P.S. Act. The presence of applicants far away from their usual place of residence further casts shadow on his defence. The sample has been taken before the concerned Magistrate, which negates the theory of any kind of adulteration. There is nothing on record to suggest that there is any animosity of the accused to the officials of the N.C.B. The Standing Order No. 1/88 has been complied with. The call details further corroborate the prosecution story.



16. Minor discrepancy in the weight of the sample sent at the Forensic Laboratory cannot shake the roots of the prosecution case.

17. Considering the facts and circumstances of the case, submissions advanced by learned counsel for the parties, nature of offence, evidence on record, pending investigation and considering the complicity of accused, severity of punishment, at this stage, without commenting any opinion on the merits of the case, this Court is not inclined to release the applicants on bail.

18. Both the bail applications are, accordingly, *rejected*.

19. However, it is directed that the court below may proceed with the trial and reach at the logical conclusion expeditiously, if there is no legal impediment, within a period of one year from the date of production of a certified copy of this order.

20. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of bail application and the said observations shall have no bearing on the merits of the case during trial.

**Order Date :- 25.04.2022**

Ravi Kant