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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 14.12.2022

+ **BAIL APPLN. 3233/2022**

LAXMAN THAKUR

..... Petitioner

Through: Mr. Aditya Aggarwal, Mr. Naveen
Panwar, Mr. Manas Agarwal, Advs.

versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through: Mr. Y.S. Chauhan, APP for State

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

JASMEET SINGH, J (ORAL)

1. This is an application seeking regular bail in FIR No. 0021/2022 dated 26.02.2022 u/s 20/29 of the NDPS Act registered at PS Crime Branch.
2. It is stated by Mr. Aggarwal that in the present case, the procedure for collection of sample is faulty and in violation of standing order 1/88 of the guidelines of NCB. To substantiate his arguments, he has drawn my attention to the seizure memo, wherein it has been stated as under:

“Before the following witnesses at 1st Floor, H No. RZ-20P / H No. 6, Gali No. Zero, East Sagarpur, two persons from Delhi, Ajit Kumar S/o Sh. Parmeshwar R/o Rasulpur Chhati, Post Chenwa, PS Rasulpur, Distt Chapra, Bihar, Age-26 Years and Laxman Thakur S/o Dharam Thakur R/o Rasulpur Chhati, Post Chenwa, PS Rasulpur, Distt Chapra, Bihar, Age-52 Years were arrested on the basis of mukhbari and searched in compliance with all legal provisions. During the search, person namely Ajit Kumar took off the black pithu bag from the shoulder, which on opening the bag and checking, a total of 6 packets covered with brown color tape were found from the bag and all the packets were found to contain

light moisture grassy material with flowers and seeds, which was found to be ganja on the basis of smelling and physical properties, which after weighing all 6 packets, 2/2 kg ganja was found in all (total 12 kg ganja) after which we put the ganja found in all 6 packets in a white big sack/ katta and tied the mouth of the sack/ katta with the help of white cloth and a pulinda was made and sealed with the stamp of MK and marked as mark „A” After this, the black bag held in Laxman's hand was checked, on which TYCOON4 is written on the bag with white thread embroidery, in which there are a total of two pockets on which there are chains. On checking the packets, transparent plastic layer was found under brown color tape and in all the packets, light sealed grass-like substance with flowers and seeds was found to be ganja on the basis of smelling and physical properties, which after weighing all 5 packets, all of them got 2/2kg ganja (total 10 kg ganja) which all Put the ganja found in 5 packets in another white sack/ katta and tie the mouth of the katta with the help of a white cloth and a pullanda was made and sealed with the stamp of MK , which was given mark B. After this, all the 11 packing materials and the above two black bag were put together in a white bag and the mouth of the katta was tied with the help of white cloth and a pulanda was made and sealed with the stamp of MK, which was given the mark C. After that all the above pulanda mark as A, B and C were taken into police custody.

Seizure has been done

Witness:

3. Ct. Radhey Shyam No. 773/Crime, AGS, Crime Branch

4. ASI Randhawa No. 3120/DW, AGS, Crime Branch

ASI Pawan Kumar

No. 2670/W

PIS No. 28900147

AGS Crime Branch, Dwarka”

3. As per the said seizure memo, the 12 Kg Ganja recovered from 6 packets in possession of Ajit Kumar were mixed and also 5 packets of 2 Kgs each found from the applicant were mixed and thereafter were sealed.

Thereafter, the samples were taken.

4. Mr. Aggarwal has relied on a judgment of '*Basant Rai vs. State*' in CrI. Appeal 909/2005 as well as '*Santini Simone vs. Department of Customs*' [2020 SCC OnLine Del 2128]

5. Per contra, Mr. Chauhan, learned APP has relied on the judgment of Supreme Court titled as '*Sumit Tomar vs. The State of Punjab*'[(2013) 1 SCC 395] and more particularly paras 11 & 12 which reads as under:

"11. The next contention, according to the learned Senior Counsel for the appellant, is that the prosecution has committed an irregularity by mixing up the contraband found in the bags and taking samples thereafter. We find no substance in the said argument. The present appellant was driving the car in which two bags of contraband were loaded. He further pointed out that in view of Section 15(c) of the NDPS Act, which prescribes minimum sentence of 10 years and which may extend to 20 years where the contravention involves commercial quantity, the mixing of two bags is a grave irregularity which affects the interest of the appellant. We are unable to accept the said contention."

12. It is true that Section 15 of the NDPS Act speaks about punishment for contravention in relation to poppy straw. As per sub-section (a) where the contravention involves small quantity, the rigorous imprisonment may extend to six months or with fine which may extend to ten thousand rupees or with both whereas under sub-section (b) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, rigorous imprisonment may extend to 10 years and with fine which may extend to one lakh rupees. Sub-section (c) provides that where the contravention involves commercial quantity, the rigorous imprisonment shall not be less than 10 years but which may extend to 20 years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. Merely because different punishments have been prescribed depending on the quantity of contraband, we are satisfied that by mixing the said two bags, the same has not caused any prejudice to the appellant. Even after taking two samples of 250 gm each, the quantity measured

comes to 69.50 kg which is more than commercial quantity (small quantity 1000 gm/commercial quantity 50 kg and above). In view of the same, the contention that the police should have taken two samples each from the two bags without mixing is liable to be rejected”

6. I have heard learned counsel for the parties.

7. The judgment of *Sumit Tomar* (supra) has been duly considered by the Coordinate Bench of this Court titled in a judgment titled as ‘*Santini Simone vs. Department of Customs*’ [2020 SCC OnLine Del 2128] and relevant paras read as under:

“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 pari materia 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 08 of 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 @ AbelKom (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.”*

8. I am of the view that as mandated by the Hon’ble Supreme Court in judgment of ‘*Union of India vs. Bal Mukund & Ors.*’ [(2009) 12 SCC 161],

standing order 1/88 has been opined to be a “requirement of law”.

9. The 3 Bench judgment of Bal Mukund (supra) is binding on this Court.

10. Relevant portion of Standing order 1/88 reads as under:

“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 packet/container in case of seizure of more than one package/container.”

11. The standing order 1/88 mandates that the transferring of content of all packets into one and then drawing a sample from the mixture is not permitted.

12. I am of the view that in the present case, the instructions in 1/88 has not been followed and the sample has been drawn after mixing the contents of various packets into one container. The same has caused serious prejudice to the case of the applicant. Since the collection of sample itself is faulty, the rigours of Section 37 of the NDPS Act will not be applicable.

13. The applicant is in custody since 26.02.2022 and has no criminal antecedents. He has no criminal cases of any nature pending against him.

14. For the aforesaid reasons, I am inclined to allow the application. The applicant is entitled to be released on bail in FIR No. 0021/2022 dated 26.02.2022 u/s 20/29 of the NDPS Act registered at PS Crime Branch on the following terms and conditions:

- i. 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;
- ii. The applicant shall appear before the Court as and when the matter is taken up for hearing;
- iii. The applicant shall join investigation as and when called by the I.O

concerned;

- iv. 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;
 - v. The applicant shall report to the local Police Station on the first Monday of every month;
 - vi. In case the applicant changes his address, he will inform the IO concerned and this Court also;
 - vii. The applicant shall not leave the country during the bail period and surrender his passport, if any, at the time of release before the I.O. concerned;
 - viii. The applicant shall not indulge in any criminal activity during the bail period;
 - ix. The applicant shall not communicate with, or come into contact with any of the prosecution witnesses, or tamper with the evidence of the case.
15. The observations made hereinabove are only for the purpose of deciding the bail application and will have no bearing on the trial.
16. The application is disposed of in the above terms.

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JASMEET SINGH, J

DECEMBER 14, 2022/dm

Click here to check corrigendum, if any