

A.F.R.**Court No. - 28****Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 9660 of 2021**Applicant :-** Om Prakash Verma**Opposite Party :-** State of U.P.**Counsel for Applicant :-** Karunakar Srivastava**Counsel for Opposite Party :-** G.A.**Hon'ble Krishan Pahal,J.**

1. Heard Sri Sri Karunakar Srivastava, learned counsel for the applicant, learned AGA for the State and perused the material placed on record.
2. Applicant seeks bail in Case Crime No. 0205 of 2021, under Sections 8/20 of The Narcotic Drugs And Psychotropic Substances Act, 1985, Police Station- Utraula, District Balrampur, during the pendency of trial.
3. As per prosecution story, 1 quintal 3 Kg 290 grams of ganja and 38 packets of cigarette rolling paper from a unnumbered Tata Tiago car along with one CMP, .303 bore, one live cartridge of .303 bore are said to have been recovered from the possession of two co-accused persons, namely, the applicant and Ram Prakash Verma. Rs.340 cash was recovered from the possession of the applicant and Rs.25,000/- cash was recovered from the possession of co-accused Ram Prakash Verma and two accused persons are stated to have run away from the scene of recovery after seeing the raiding party.
4. Learned counsel for the applicant has argued that in all the said contraband was recovered from 19 packets and one polythene amounting to total of 1 quintal 3 Kg and 290 grams and only one sample has been taken from the said contraband. This is a clear violation of Clause 2.4 of the Standing Order No.1 of 1989.
5. Learned counsel for the applicant has further argued that the said sample has been sent for testing after a delay of twenty days, which is also clear violation of the said Standing Order, as it is provided in it that the contraband should be sent for chemical analysis

within a period of 72 hours. The said delay has categorically prejudiced the accused and there is every possibility of interpolation and adulteration in the said sample.

5. Learned counsel for the applicant has placed reliance on the case law settled by the Apex Court in case of ***State of Rajasthan vs. Tara Singh***¹, in which it has been held as under:-

(2) At the very outset, it must be understood that the provisions of Section 50 would no longer be applicable to a search such as the one made in the present case as the opium had been carried on the head in a gunny bag. A Bench of this Court in State of Himachal Pradesh v. Pawan Kumar, after examining the discrepant views rendered in various judgments of this Court has found that Section 50 of the Act would not apply to any search or seizure where the article was not being carried on the person of the accused. Admittedly, in the present case, the opium was being carried on the head in a bag. Mr. Abhishek Gupta, the learned Counsel for the appellant-State, therefore, appears to be right when he contends that the observations of the High Court that the provisions of Section 50 of the Act would not be applicable was no longer correct in view of the judgment in Pawan Kumar's case. We find, however, that the second aspect on which the High Court has opined calls for no interference. As per the prosecution story the samples had been removed from the Malkhana on the 26th of February, 1998, and should have been received in the laboratory the very next day. The High Court has, accordingly observed that the prosecution had not been able to show as to in whose possession the samples had remained from 26th February, 1998 to 9th March, 1998. The High Court has also disbelieved the evidence of PW-6 and PW-9, the former being the Malkhana incharge and the latter being the Constable, who had taken the samples to the Laboratory to the effect that the samples had been taken out on the 9th of March, 1998 and not on the 26th February, 1998. The Court has also found that in the absence of any reliable evidence with regard to the authenticity of the letter dated 26th February, 1998 it had to be found that the samples had remained in some unknown custody from the 26th February, 1998 to 9th March, 1998. We must emphasise that in a prosecution relating to the Act the question as to how and where the samples had been stored or as to when they had dispatched or received in the laboratory is a matter of great importance on account of the huge penalty involved in these matters. The High Court was, therefore, in our view, fully justified in holding that the sanctity of the samples had been compromised which cast a

1 (2011) 11 SCC 559

doubt on the prosecution story. We, accordingly, feel that the judgment of the High Court on the second aspect calls for no interference. The appeal is, accordingly, dismissed. The respondent is on bail. His bail bonds stand discharged."

6. Learned counsel for the applicant has submitted that the general procedure for sampling provided in Standing Order No. 01 of 1989 dated 13.06.1989 has not been complied by the opposite party. He has relied upon clause 2.1 to 2.8 of the aforesaid standing order quoted herein below :-

"2.1 All drugs shall be classified, carefully, weighed and sampled on the spot of seizure.

2.2 All the packages/containers shall be 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 witnesses (Panchas) and the persons from whose possession the drug is recovered and a mention to this effect should invariably be made in the panchnama drawn on the spot.

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 cases of opium, ganja and charas (hashish) 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 drawn.

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 contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects the packages/container may be carefully bunched in lots of 10 package/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 Where after 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 would be necessary and no samples need be drawn.

2.7 If such remainder is 5 or 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 remainder package/container.

2.8 While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative sample the 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."

7. Learned counsel has submitted that the above clauses of the standing order aforesaid clearly show that the police was required to draw a sample from each packet allegedly recovered with the help of field testing kit. The mixing of the material from all the packets and then drawing of representative sample is not provided in the Standing Order, as if, such a course is adopted the sample would seize to be representative sample of the corresponding packet. In the present case 19 packets and one polythene bag were recovered from the possession of the two accused persons and the procedure given in clause 2.4 of the Standing Order No. 1 of 1989 was strictly required to be followed since there were only 20 packets in all from which the sample was to be drawn. At this point of time, it cannot be ascertained whether all the 19 packets and one polythene bag (total 20 in all) contained the alleged contraband of ganja or not.

8. Learned counsel for the applicant has also relied upon the judgment of Delhi High Court in the case of *Aman Fidel Chris v. Narcotics Control Bureau, Crl. Appeal No.1027 of 2015 & Crl. M.B. 511 of 2019 and Crl. M.A. 1660 of 2020*, in support of his contentions. In this case the conduct of the prosecution of not drawing individual sample from each packet recovered was considered to be violation of Standing Order aforesaid.

9. Learned counsel for the applicant has argued that the applicant is absolutely innocent and has been falsely implicated in the present case with a view to cause unnecessary harassment and to victimize him. The applicant is languishing in jail since 22.06.2021. In case, the applicant is released on bail, he will not misuse the liberty of bail.

10. Learned A.G.A. has vehemently opposed the bail application on the ground that the recovery of the contraband article is of commercial

quantity.

11. The Apex Court in case of *Noor Aga v. State of Punjab*², has held in paragraphs 123, 124 and 125 that the standing order in dispute and other guidelines issued by the authority having legal sanction are required to be complied by the arresting authorities. For ready reference the aforesaid paragraphs are quoted hereinbelow:-

“(123) Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-a-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefore, it becomes obligatory on the part of the sub ordinate authorities to comply therewith.

(124) Recently, this Court in State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr.³, following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan⁴, held that statutory instructions are mandatory in nature.

(125) Logical corollary of these discussions is that the guidelines such as those present in the Standing Order can not 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 of these guidelines by the investigating authority which leads to drawing of an adverse interference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.”

12. The Apex Court in the Case of *Union of India vs. Shiv Shankar Keshari*⁵, has held that the court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

2 (2008) 3 JIC 640 (SC)

3 (2008) 3 SCC 582

4 (2004) 10 SCC 1

5 (2007) 7 SCC 798

13. Considering the facts of the case and keeping in mind, the ratio of the Apex Court's judgment in the case of *Union of India vs. Shiv Shankar Keshari (supra)* larger mandate of Article 21 of the constitution of India, the nature of accusations, the nature of evidence in support thereof, the severity of punishment which conviction will entail, the character of the accused-applicant, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interest of the public/ State and other circumstances, but without expressing any opinion on the merits, I am of the view that it is a fit case for grant of bail.

14. Let the applicant- **Om Prakash Verma**, who is involved in the aforementioned case crime be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions. Further, before issuing the release order, the sureties be verified.

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the date fixed for evidence when the witnesses are present in Court. In case of default of this condition, it shall be open for the Trial Court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the Trial Court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the Trial Court may proceed against him under Section 229-A IPC.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C., may be issued and if applicant fails to appear before the Court on the date fixed in such proclamation, then, the Trial Court shall initiate proceedings against him, in accordance with law, under Section 174-A IPC.

(iv) The applicant shall remain present, in person, before the Trial Court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under Section 313 Cr.P.C. If in the opinion of the Trial Court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the Trial Court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

15. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

16. It is made clear that observations made in granting bail to the applicant shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

Order Date :- 11.03.2022

Ravi Kant