

A.F.R.

Court No. - 91

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 19743 of 2020

Applicant :- Phool Chand Ali

Opposite Party :- Union Of India (Narcotics Control Bureau, Lucknow)

Counsel for Applicant :- Rajesh Pratap Singh, Om Prakash Singh (Senior Adv.)

Counsel for Opposite Party :- Ashish Pandey

Hon'ble Gautam Chowdhary, J.

1. Heard Sri Om Prakash Singh, learned Senior Counsel for the applicant and Sri S.R. Singh, learned counsel holding brief of Shri Ashish Pandey, learned counsel for opposite party.

2. The allegation against the applicant in the complaint filed by opposite party is that on 25.08.2019 Circle Officer, STF, Lucknow informed the Intelligence Officer that two persons namely Shalam Ali and Phool Chand Ali were carrying 150 kg *Ganja* in one Bolero Camper No.AS16B8229 coming from Assam through Gorakhpur to Mau. This information was conveyed to N.C.B., Lucknow who after constituting a team arrested the said applicants on 25.08.2019 from Mau. Applicant disclosed his identity as Phool Chand Ali and Shalam Ali. *Ganja* was found concealed in the secret cavity between middle seat and back seat of the car. After opening of cavity made in the car 14 packets wrapped with white polythene and 5 packets from middle of the seat was found. After weighing all the material total quantity was found to be 149 kg. Thereafter small quantity of *ganja* was drawn from each packet by way of scratching and after mixing them well, two representative samples, each weighing about 24 gms, were drawn and were sealed.

3. Learned Senior 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.

4. Learned Senior Counsel has submitted that a reading of the above clauses of the standing order aforesaid clearly show that the opposite party 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 since if such a course is adopted the sample would cease to be representative sample of the corresponding packet. In the present case 19 packets were allegedly recovered from the possession of the applicant and therefore the procedure given in clause 2.4 of the Standing Order No. 1 of 1989 was required to

be followed since there were only 19 packets. He has further submitted that the mixing of small quantity of the alleged contraband in 19 packets and thereafter taking of sample has caused serious prejudice to the case of the applicant since it cannot be ascertained whether all the 19 packets contained the alleged contraband of *ganja* or not.

5. Learned Senior Counsel has relied upon the judgment of Delhi High Court in the case of ***Aman Fidel Chris vs. 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.

6. Learned counsel for the opposite party, has vehemently opposed the bail application and submitted that bail cannot be granted to the applicant in such cases. He has relied upon the compilation of case laws which are follows:-

1. ***Union of India vs. Ratan Malik (2009) 2 SCC 624***

2. ***Union of India vs. Ram Samujh and Another (1999) 9 SCC 429***

3. ***Shushant Gupta vs. Union of India 2014 (3) ACR 2564***

4. ***State of M.P. vs. Kajd (2001) 7 SCC 673***

5. ***Union of India vs. Niyazuddin SK and Ors AIR 2017 SC 3932***

6. ***State of Kerala and Ors vs. Rajesh and Ors AIR 2020 SC 721***

7. ***Satpal Singh vs. State of Punjab MANU/SC/0413/2018,(2018) 12 SCC 813***

8. ***Shailendra Kumar Gupta vs. State of U.P. MANU/UP/0653/2020***

7. He has submitted that the judgment of the Delhi High Court relied upon by the Senior Counsel for the applicant is in respect of a Criminal Appeal and shall not be applicable to the case where only consideration of bail is involved, in view of Sections 37, 35, 67, 53-A and 54 of N.D.P.S Act. In the case of Hon'ble Delhi High Court only four packets were seized and the goods therein were mixed and two representative samples of 5 grams each were drawn. In the present case samples were drawn from each of the 19 packets and thereafter sample of 24 grams in duplicate were made. The samples were drawn in the presence of Magistrate and certified by him. The Hon'ble Supreme Court in the case of ***Mohan Lal vs. State of Punjab, (2018) SCC Online SC 974*** has upheld such a conduct of prosecution. The Hon'ble Delhi High Court has ignored clauses

2.3, 2.5 and 2.6 of the standing order no. 1 of 1989 which operate as exception to clause 2.4 thereof. However clause 2.4 is only advisory and not mandatory and compulsory providing for drawing one sample each from each packet recovered. In the present case clause 2.8 of the standing order has been complied. The judgments referred by the opposite party have not been considered by the Hon'ble Delhi High Court in the judgment cited. The issue with respect to sampling is beyond the pleadings contained in the bail application and the other legal requirements of panchanama, recording of statements etc., have been fully complied in the present case.

8. After considering the rival submissions this court finds that the argument on behalf of the applicant, that the clause 2.4 of the standing order was not complied and no representative samples were drawn from all the 19 packets recovered by the prosecution allegedly from the car of the applicant is well founded. The reply of the counsel for the opposite party that clause 2.4 of the standing order is only advisory and not mandatory and compulsory has not found in favour with the Apex Court in the case of **Noor Aga vs. State of Punjab and Another, 2008 (3) JIC 640 (SC)**. The Apex court has held in paragraph nos. 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 subordinate 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-à-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 therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

*124. Recently, this Court in **State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582]**, following the earlier decision of this Court in **Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1]** 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 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 of 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.

9. The judgment of the Delhi High Court relied upon by the

counsel for the applicant is in conformity with the judgment of the Apex Court in the case of **Noor Aga (supra)** which has been reiterated by the Apex Court in the case of **Mohan Lal vs. State of Punjab, (2018) SCC Online SC 974**. The issue raised by the learned Senior Counsel has not been answered in the compilation of case laws filed by the counsel for the opposite party. They are only related to the question whether bail should be granted to the accused in cases under N.D.P.S Act or not. Liberal approach of the court is unwarranted and bail can be granted only under exceptional circumstances. Learned counsel for the opposite party has not cited any judgment showing the ratio laid down by the Apex Court in the case of **Noor Aga (supra)** in paragraph nos. 123 to 125 is not correct.

10. The second argument of the counsel for the opposite party, that at the stage of consideration of bail application, the judgment passed in criminal appeal is not relevant requires consideration. It is not deniable that the rigorous section 37 of the N.D.P.S Act provides that the court must adopt a negative attitude towards bail and only when it is satisfied that there are reasonable grounds of believing that the accused is not guilty of offence alleged and that he is not likely to commit any offence while on bail, he can be enlarged on bail. In the present case there is non-compliance of the procedure of sampling provided under the standing order which has statutory force and therefore the applicant may not be held guilty after trial. Secondly, there is no prior criminal history of the applicant which may compel this court to take the view that the applicant will commit further offence after being enlarged on bail. This is his first implication.

11. The Apex Court in the Case of **Union of India vs. Shiv Shankar Keshari, (2007) 7 SCC 798** 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.

12. Keeping in view the nature of the offence, argument advanced on behalf of the parties, evidence on record regarding complicity of the accused, larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court in the case of **Dataram Singh Vs. State of U.P. and another reported in (2018) 3 SCC 22** and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has

made out a case for bail. The bail application is allowed.

13. Let the applicant, Phool Chand Ali, in N.C.B. Case Crime No.35 of 2019, under Section 8/20/27A/29 of the N.D.P.S Act, 1985, Chalani Police Station- N.C.B. Lucknow, Police Station- Kotwali, District- Mau, be released on bail in the aforesaid case crime number on his furnishing a personal bond and two reliable sureties of the like amount to the satisfaction of the court concerned with the following conditions-

1. The applicant shall not tamper with the prosecution evidence by intimidating/ pressurizing the witnesses, during the investigation or trial.
2. The applicant shall cooperate in the trial sincerely without seeking any adjournment.
3. The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.
4. 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 of the Indian Penal Code;
5. In case, the applicant misuses the liberty of bail and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the 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 of the Indian Penal Code.
6. The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against him in accordance with law.
7. In case the applicant has been enlarged on short term bail as per the order of committee constituted under the orders of Hon'ble Supreme Court his bail shall be effective after the period of short term bail comes to an end.
8. The applicant shall be enlarged on bail on execution of personal bond without sureties till normal functioning of the

courts is restored. The applicant will furnish sureties to the satisfaction of the court below within a month after normal functioning of the courts are restored.

9. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

10. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

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

Order Date :- 12.10.2020

shiv/ K.C. Singh