

HIGH COURT OF DELHI**Bench: Justice Navin Chawla****Date of Decision: 25.01.2024**

Bail Appln. 3016/2023 & 3048/2023

Sandeep @ Chiku & Vineet Kumar Petitioners**Versus****State (NCT Of Delhi) Respondent****Legislation:**

Sections 20, 61, 37, 41, 42, 43, 44, 52, 52A, 85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act)

Sections 147, 149 of the Railways Act, 1989

Section 439 of the Code of Criminal Procedure, 1973 (CrPC)

Subject: Bail applications under Section 439 CrPC by the accused in FIR No.34/2022 registered under NDPS Act and Railways Act for possession of Ganja/Marijuana.**Headnotes:**

Violation of Sampling Procedure – Bail Granted – Accused arrested for possession of 24kg+ Ganja/Marijuana – Sampling procedure in violation of Standing Orders No.1/88 and 1/89 – Non-compliance raised reasonable doubt about guilt – Previous judgments cited for similar decisions in cases of procedural violation. [Paras 6-7, 19, 21, 28-29]

Section 37 NDPS Act – Rigorous Bail Conditions – Court must be satisfied with reasonable grounds for believing accused is not guilty – In this case, procedural non-compliance led to belief of not guilty. [Para 8, 27-29]

Impact of Non-Compliance on Trial – Non-compliance of mandatory procedures in NDPS Act raises reasonable grounds for belief of not guilty – Sampling method critical for case's merit – Court's decision not a comment on overall merit. [Paras 27-31]

Decision: Applications granted – Accused to be released on bail subject to conditions – Personal bond of Rs. 50,000 each with local surety – Various conditions imposed including not leaving country without court permission, appearing for hearings, maintaining working mobile numbers, and not indulging in criminal activity or contacting witnesses. [Paras 30-33]

Referred Cases:

- Laxman Thakur v. State (Govt. of NCT of Delhi), 2022 SCC OnLine Del 4427
- Amina v. State NCT of Delhi (2023) SCC OnLine Del 3491
- Ginkala Meddilety v. State 2023 SCC OnLine Del 5450
- State of Kerala & Ors. V. Rajesh and Ors. (2020) 12 SCC 122
- Masibur Khan v. State (Govt. Of NCT of Delhi) 2023 SCC OnLine Del 3326

- Shailender v. State of NCT of Delhi 2022 SCC OnLine Del 4896
- Saddam Alam v. State (Govt. Of NCT Delhi) NC 2023:DHC:7494
- Mukesh Rajaram Choudhari v. The State of Maharashtra, 2023:BHC-AS:28549

Representing Advocates:

For Petitioner(s): Mr. Hiren Sharma, Mr. Vimal Tyagi, Mr. Mohit Yadav, Mr. Balaji Pathak, Mr. Vishal, Mr. Sunil Dalal, Sr. Adv., Mr. Mahabir Singh, Mr. Nikhil Beniwal, Mr. Navish Bhati, Mrs. Manisha Saroha

For Respondent(s): Mr. Aman Usman, APP with Insp. U. Balashankram, SHOPS SRRS, SI Deep Sharma, SI Vinod Kumar, Vigilance/Rohini & ASI Sunder Lal, Distt. Line/Railway.

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HON'BLE MR. JUSTICE NAVIN CHAWLA
J U D G M E N T

1. These applications have been filed under Section 439 of the Code of Criminal Procedure, 1973 (in short, 'CrPC') by the accused persons seeking to be released on regular bail in FIR No.34/2022 registered at Police Station: Sarai Rohilla Railway Station, Delhi under Sections 20/61/85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, 'NDPS Act') and Sections 147/149 of the Railways Act, 1989.
2. As both the applicants have been arrayed as co-accused in the above FIR, and as identical pleas are being taken for seeking regular bail, these applications are being dealt and considered by this Court by this common judgment.

Factual Matrix

3. It is the case of the prosecution that, on 31.10.2022, ASI Sunder Lal alongwith staff was on patrolling duty at Sarai Rohilla Railway Station. At around 2.00 p.m., when the police party reached at the parcel area side at Platform No.1, they found two boys, who were holding a trolley bag each in their hands and were carrying a backpack each. On seeing the police party, the boys started moving towards Dayabasti. On suspicion, both were stopped by the police and were inquired about their luggage. As they could not give a satisfactory answer upon being questioned, their luggage was checked and 8 packets each, wrapped with brown tape, were recovered from the trolley bags carried by each of them, while 4 packets each, wrapped with brown tape, were recovered from the backpacks carried by each of them. Therefore, a total of 12 packets each were recovered from the possession of each of them.
4. Prosecution alleges that these 12 packets were containing dark greenish leaves and seeds, which were looking and smelling like

Ganja/Marijuana. From Sandeep @ Chiku (Applicant in Bail Appln 3016/2023), the total quantity recovered was 24kg and 450 grams, while from Vineet (Applicant in Bail Appln 3048/2023), the total quantity recovered was 24kg and 200 grams.

5. An application was thereafter filed before the learned Metropolitan Magistrate-05 (Central District), Tis Hazari Courts, Delhi (hereinafter referred to as 'Metropolitan Magistrate') for carrying out sampling and seizure process under Section 52A(2) of the NDPS Act. The same was carried out on 05.11.2022, and as per the Order, it is reflected that while seizing the substance recovered from the trolley bag carried by accused Sandeep @ Chiku, 8 brown packets which were recovered had been emptied into a green polythene and mixed all together. From this mixed quantity, samples were drawn. Similarly, the substance recovered from 4 brown packets that were being carried by accused Sandeep in a backpack had again been mixed together and kept in a green polythene. It was from this mixed quantity that samples were drawn before the learned Metropolitan Magistrate. The same procedure had been followed for the accused Vineet.

Applicant's Submissions

6. The learned counsels for the applicants submit that the sampling procedure followed by the prosecution is in violation of the Standing Order No.1/88 dated 15.03.1988 issued by Narcotics Control Bureau, and the Standing Order no.1/89 dated 13.06.1989 issued by the Department of Revenue, Ministry of Finance, Government of India.

7. Placing reliance on the judgments of this Court in ***Laxman Thakur v. State (Govt. of NCT of Delhi)***, 2022 SCC OnLine Del 4427; ***Amina v. State NCT of Delhi*** (2023) SCC OnLine Del 3491; and, ***Ginkala Meddilety v. State*** 2023 SCC OnLine Del 5450, they submit that this Court has, in cases where the sampling procedure followed by the prosecution is not in conformity with the above mentioned Standing Orders, released the accused(s) on bail.

Respondent's Submissions

8. On the other hand, the learned APP submits that Section 37 of the NDPS Act states that where the offence involves commercial quantity, the accused can be released on bail only where the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while being enlarged on bail. He submits that the expression 'reasonable grounds' means something more than *prima facie* grounds; it contemplates substantial

probable cause for believing that the accused is not guilty of the alleged offence. In support, he places reliance on the judgment of the Supreme Court in ***State of Kerala & Ors. v. Rajesh and Ors.*** (2020) 12 SCC 122.

9. He further submits that the purpose of Section 52A of the NDPS Act is for the disposal of the case property after making inventory and keeping the samples of seized contraband. It is for the purpose of keeping representative samples for being exhibited during the course of the trial as primary evidence. He submits that the Standing Orders No.1/88 and 1/89 are merely advisory in nature and not mandatory. Their non-compliance is neither fatal to the case of the prosecution nor does it entitle the accused to be released on bail. The effect of such non-compliance can only be determined at the conclusion of the trial, where the accused would have to show the prejudice caused due to such non-compliance. In support, he places reliance on the judgment of this Court in ***Masibur Khan v. State (Govt. Of NCT of Delhi)*** 2023 SCC OnLine Del 3326; ***Shailender v. State of NCT of Delhi*** 2022 SCC OnLine Del 4896; and ***Saddad Alam v. State (Govt. Of NCT Delhi)*** NC 2023:DHC:7494, and of the High Court of Bombay in ***Mukesh Rajaram Choudhari v. The State of Maharashtra***, 2023:BHC-AS:28549.

10. He submits that in the present case, there was a substantial compliance with the said Standing Orders and therefore, the accused be not released on bail.

Analysis and Findings

11. I have considered the submissions made by the learned counsels for the parties.

12. Section 52 of the NDPS Act provides for the disposal of the persons arrested and article seized under Section 41, 42, 43 or 44 of the NDPS Act. It reads as under:

“52. Disposal of persons arrested and articles seized.—(1) Any officer arresting a person under section 41, section 42, section 43 or section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under sub-section (1) of section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under sub-section (2) of section 41, section 42, section 43 or section 44 shall be forwarded without unnecessary delay to—

- (a) the officer-in-charge of the nearest police station, or*
- (b) the officer empowered under section 53.*

(4) The authority or officer to whom any person or article is forwarded under subsection (2) or sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article.”

(Emphasis supplied)

13. Section 52 of the NDPS Act mandates that the authority or officer to whom any person or article is forwarded under that Section, shall, with all convenient despatch, take such measures as may be necessary for the disposal of such person or article.

14. Section 52A of the NDPS Act provides for disposal of seized Narcotic Drugs and Psychotropic Substances and its procedure, including sampling. It reads as under:-

52A. Disposal of seized narcotic drugs and psychotropic substances.— (1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, 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 drugs, psychotropic substances, controlled substances or conveyances 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 subsection (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances 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, psychotropic substances, controlled substances or conveyances 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, substances or conveyances. 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) Where an application is made under subsection (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) 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.

15. A reading of Sub-Section 2 of Section 52A read with Section 52 of the NDPS Act would show that where any narcotic drugs and psychotropic substances, controlled substance or conveyances are seized, they shall, without unnecessary delay, be forwarded to the Magistrate by whom warrant was issued or to the Officer-In-Charge of the nearest Police Station or to the Officer empowered under Section 53 of the NDPS Act. The Authority or the Officer to whom such seized articles are forwarded shall, with all convenient dispatch, take such measures as may be necessary for the disposal thereof, according to the law. The Officer empowered under Section 53 of the NDPS Act, to whom the articles seized are forwarded, shall prepare an inventory of such seized materials giving such details and other particulars as are considered relevant to the identity of the seized articles and make an application to any Magistrate for the purpose of certifying the correctness of the inventory so prepared; or taking, in the presence of such Magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or 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. The exercise so done shall be treated as primary evidence in respect of the offence.

16. The manner of drawing of samples has been laid down in the Standing Order no.1/88. The relevant provisions of which read as under:

“1.4 If the drugs seized are found in packages/containers the same should be serially numbered for purposes of identification. In case the drugs are found in loose form the same should be arranged to be packed in unit containers of uniform size and serial numbers should be assigned to each package/container. Besides the serial number the gross and net weight, particular of the drug and the date of seizure should invariably be indicated on the packages. In case sufficient space is not available for recording the above information on the package, a Card Board label, should be affixed with a seal of the seizing officer and on this Card Board label, the above details should be recorded.

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 a mention to this effect should invariably be made in the panchanama drawn on the spot.

1.6 Quantity of different drugs required in the sample:

The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except 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 should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

1.7 Number of samples to be drawn in each seizure case

- a) In the case of seizure of a single package/container one sample in duplicate is to 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.

- b) However, when the package/containers seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by U.N. kit, conclusively indicating that the packages are identical in all respect/the packages/ container may be carefully bunched in lots of 10 packages/containers. In case of seizure of Ganja and Hashish, the packages/containers may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample in duplicate may be drawn.*
- c) Whereafter making such lots, in the case of Hashish and Ganja, less than 20 packages/containers remain, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.*
- d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hashish, one more sample in duplicate may be drawn for such remainder package/containers.*
- e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug 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.*

1.8 Numbering of packages/containers

Subject to the detailed procedure of identification of packages/containers, as indicated in para 1.4 each package/container should be securely sealed and in identification slip pasted/attached on each one of them at such place and in such manner as will avoid easy obliteration of the marks and numbers on the slip. Where more than one sample is drawn, each sample should also be serially numbered and marked as S-1, S-2, S-3 and

so on, both original and duplicate sample. It should carry the serial number of the packages and marked as P-1,2,3,4 and so on.”

17. Almost *pari-materia* provision is found in the Standing Order No.1/89.

The relevant provisions of which are reproduced herein below:

“SECTION II- GENERAL PROCEDURE FOR SAMPLING, STORAGE ETC.

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

2.2 All the packages/containers shall be serially 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 witness (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama 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 cases of opium, ganja and charas (hasish) 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 content of each package given identical results on color test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of 10 packages/ 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 Whereafter 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 will be necessary and no sample need to be drawn.

2.7 If such remainders are 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 a reminder package /container.

2.8 *While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative sample are in equal quantity is taken from a package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.*

2.9 *The sample in duplicate should be kept in heat sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should bear the S.No. of the package(s)/containers from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope which should also be sealed and marked „secret-drug sample/ Test memo“ is to be sent to the chemical laboratory concerned.*

3.0 *The Seizing officers of the Central Government Departments, viz., Customs, Central Excise, Central Bureau of Narcotics, Narcotics Control Bureau, Directorate of Revenue Intelligence etc. should dispatch samples of the seized drugs to one of the Laboratories of the Central Revenues Control Laboratory nearest to their office depending upon the availability of test facilities. The other Central Agencies like BSF, CBI and other Central Police Organizations may send such sample to the Director, Central Forensic Laboratory, New Delhi. All State Enforcement Agencies may send samples of seized drugs to the Director/Deputy Director/Assistant Director of their respective State Forensic Science Laboratory.*

3.1 *After sampling, detailed inventory of such packages /containers shall be prepared for being enclosed to the panchanama. Original wrappers shall also be preserved for evidentiary purposes.”*

18. A reading of the Standing Order No.1/89 would show that all packages/containers are to be serially numbered and kept in lots for sampling. In cases where more than one package/container is seized, it is advisable to draw one sample (in duplicate) from each of such packets/containers. Clause 2.5 of the Standing Order, however, states that where the packages/containers seized together are identical in size and weight, bearing identical marking, and the content of each packets gives identical result on colour testing by Drug Identification Kit, conclusively indicating that the packages/containers are identical in all respects, the packages/containers may be bunched together in lots of 10 packages/containers (in case of *ganja* and *hashish* lots of 40 packages/containers) and for each of such lots of packages/containers, one sample (in duplicate) may be drawn. Clause 2.8 states that, while drawing the samples from a particular lot, it must be ensured that representative samples

in equal quantity are taken from a package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot. Therefore, the identity of the packages/containers including their contents has to be preserved while drawing the samples. They cannot all be mixed together to thereafter draw samples. The Standing Order only allows that where the lots of such packages/containers are prepared, samples in equal quantity are taken from each packages/containers of that lot, mixed together, and thereafter sample drawn from such composite whole of samples.

19. In the present case, the above procedure has been completely violated and not adhered to by the prosecution. As noted hereinabove, the prosecution emptied all the packages that were recovered from the trolley bag of the accused persons into one composite whole and thereafter, samples from such composite whole were drawn before the learned Metropolitan Magistrate. Similar exercise was done for the packages recovered from the backpacks carried by the accused. This is clearly is not in compliance with the Standing Orders.

20. In similar circumstances, in **Laxman Thakur** (supra), this Court, placing reliance on the judgment of the Supreme Court in **Union of India v. Bal Mukund and Ors**, (2009) 12 SCC 161, and the judgment of this Court in **Santini Simone vs. Department of Customs** (2020) SCC OnLine Del 2128, which in turn had considered the earlier judgment of the Supreme Court in **Sumit Tomar v. State of Punjab**, (2013) 1 SCC 395, and of this Court in **Amani Fidel Chris** (supra); **Basant Rai vs. State** (2012) SCC OnLine Del 3319; **Edward Khimani Kamau v. The Narcotics Control Bureau** (2015) SCC OnLine Del 9860; **Charlse Howell @ Abel Kom v. The Narcotics Control Bureau** 2018 SCC OnLine Del 10564, held as under:

“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.”

21. In **Amina** (supra), a Co-ordinate Bench of this Court again considered the effect of the violation of the Standing Order(s), and held as under:

“27. From a careful assessment of the decisions cited above and the perusal of the Standing Orders, this Court is of the considered opinion that the Standing Orders have to serve a certain purpose having been issued by the Narcotics Control Bureau, Government

of India and cannot be rendered optional for compliance to the investigating agencies. The procedures prescribed in the said orders are based upon a certain logic which ought to be respected, or else it would be a worthless piece of paper. Notwithstanding that Courts in the decisions cited above have accepted it as a mandatory directive [refer to Noor Aga (supra), Bal Mukund (supra), Basant Rai (supra) Santini Simone (supra) and finally Amani Fidel (supra)], even the Hon'ble Supreme Court while taking a view that Section 52 & Section 57 NDPS were directory in Gurbax Singh (supra) said that "the IO cannot totally ignore these provisions". Even Balbir Singh (supra) states that non-compliance does not render the trial initiate "the officers, however, cannot totally ignore these provisions". Therefore, in this Court's view, the Standing Orders ought to be respected by the investigating agencies and non-compliance of those Standing Orders may naturally invoke a reasonable doubt relating to the process of sampling which is the most critical procedure to be carried out in order to ascertain the nature of the substance and its quantity. In fact, the Field Officers Handbook issued by the Narcotics Control Bureau for Drug Law Enforcement also reiterates these procedures prescribed under the Standing Orders. xxx

29. The adherence to strict process under the NDPS Act has certain important function and purpose. The Hon'ble Supreme Court has often reemphasized that considering the provisions of the NDPS Act are stringent in nature and provide twin conditions as a threshold for granting bail under Section 37 of the Act, compliance by the investigating agencies has to be necessarily precise and not ad hoc or half-hearted or truncated in nature.

30. The lack of compliance of these provisions necessarily imports an element of "doubt", moreover a "reasonable doubt". This, therefore will segway into the issue of proving guilt, considering that the guilt of any accused has to be proved beyond reasonable doubt. It would therefore not be enough to contend, as is done by the prosecution that issues of noncompliance were to be considered at the time of trial and what prejudice is caused to the accused, had to be shown by the accused. Even if that may be so, if such non-compliance provides reasonable ground for acquittal of an accused [depending on the nature of the evidence led, as it was in the case of Amani Fidel (supra)], a fortiori at the stage of granting bail, it would be even more important to consider this possibility, even if it is just a possibility. At the stage of granting bail, the accused is still not proved as guilty and is under trial and therefore deserves the benefit of doubt.

31. Pursuant to appreciation of contentions of the parties as well as documents on record, this Court is of the considered opinion that the petitioner is entitled to be enlarged on bail subject to certain conditions."

22. Another Hon'ble Single Judge of this Court followed the above judgement in similar circumstances and released the accused therein on bail in **Ginkala Meddilety** (supra).

23. I must herein also note the purported contrary view taken by this Court in **Masibur Khan** (supra), wherein this Court distinguished the judgment of **Bal Mukand** (supra), **Santini Simone** (supra), **Edward Khimani Kamau** (supra), and **Charlse Howell** (supra), stating that these were rendered in appeal after completion of the trial, and further held as under:

“...Whether non-compliance of rules could be a ground for grant of bail, especially in cases involving a commercial quantity, where the twin conditions of Section 37 of the NDPS Act would required to be satisfied, will have to be examined considering the nature of iolation of such standing procedure and consequences thereof.”

24. In the above judgment, on facts of that case, the court held that the procedure adopted by the prosecution was not defective in nature. The said judgment, therefore, will not come to any aid of the prosecution.

25. In **Shaliender** (supra), this Court observed that the circumstances under which the sampling procedure could not be followed as per the mandate, needs to be duly considered after evidence has been led on record and the FSL Expert is examined. This Court held that at this stage, there is no reasonable ground to give a finding that the entire proceedings stand vitiated because of alleged sampling procedure adopted by the Investigating Agency. The Court also found the reason given by the learned Trial Court for rejecting the bail to the accused therein, which was that the quantity found even in one package was intermediatory in nature, to be relevant to refuse the bail. The said judgment may not be applicable in the facts of the present case inasmuch as the prosecution has made no endeavour to explain why the procedure set out in the Standing Orders was not followed.

26. In **Saddad Alam** (supra), the accused therein had been earlier arrested in a similar case and had been released on bail on the condition that he will not commit any other offence while on bail. The accused had violated the said condition imposed by the concerned Court and, therefore, was held not entitled to be released on bail.

27. The High Court of Bombay in **Mukesh Rajaram Choudhari** (supra) has held that non-compliance with the procedure under Section 52A of the NDPS Act cannot mean that the accused automatically becomes entitled to bail as a matter of right. In my view, however, the non-compliance with the provisions of Section 52A of the NDPS Act would need to be explained by the prosecution at the trial and till then, the cardinal rule that the accused is presumed to be not guilty shall get attracted for holding that *“there are reasonable grounds for believing that he is not guilty of such offence”* and that the accused meets the pre-condition for release on bail as prescribed in

Section 37 of the Act. It is settled law that when a thing is prescribed to be done in a particular manner, it must be done in that manner or not at all. As the manner of sampling has been prescribed in the above two Standing Orders, non-compliance thereof would give rise to reasonable grounds for believing that the accused is not guilty of the offence alleged against him based on the alleged seizure and sampling.

28. In the present case, *prima facie* the sampling procedure followed by the prosecution was not in conformity with the terms of the Standing Orders no.1/88 and 1/89. There is also no prior history of any prosecution being pending against the accused persons herein. The accused have already been in custody for more than a year. Both the accused are aged around 20 years and the trial is likely to take long.

29. In my view, therefore, the applicants have been able to meet the test laid down in Section 37 of the NDPS Act and of being enlarged on bail.

Directions

30. Accordingly, it is directed that the applicants be released on bail in FIR No.34/2022 dated 31.10.2022 registered at Police Station, Sarai Rohilla Railway Station, Delhi under Sections 20/61/85 of NDPS Act and Sections 147/149 of the Railways Act, 1989 on furnishing a personal bond in the sum of Rs.50,000/- each with one local surety, each, of the like amount, subject to the satisfaction of the Ld. Trial Court, and further subject to the following conditions:
- i. The Applicant(s) will not leave the country without the prior permission of the Ld. Trial Court.
 - ii. The Applicant(s) shall provide his permanent address to the Ld. Trial Court. The applicant(s) shall also intimate the Court, by way of an affidavit, and to the IO regarding any change in his residential address.
 - iii. The Applicant(s) shall appear before the Ld. Trial Court as and when the matter is taken up for hearing.
 - iv. The Applicant(s) shall provide all/latest/fresh mobile numbers to the IO concerned, which shall be kept by the applicant(s) in a working condition at all times and shall not be switched off or changed by him without prior intimation to the Ld. Trial Court and the IO concerned. The mobile location be kept on at all times.
 - v. The Applicant(s) shall not indulge in any criminal activity and shall not communicate with or come in contact, directly or indirectly, with any of the prosecution witnesses. In case the Applicant(s) is found involved in another

case, it will be open to the prosecution to file an appropriate application seeking cancellation of his bail in the present case as well.

31. Needless to state, any observation touching the merits of the case is purely for the purposes of deciding the question of grant of bail and shall not be construed as an expression on merits of the matter.
32. The bail applications are disposed of in the above terms.
33. Copy of this judgment be sent to the Jail Superintendent for information and necessary compliance.

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