

**IN THE COURT OF ASJ/SPECIAL JUDGE/NDPS
PATIALA HOUSE COURTS, NEW DELHI
Presided by: Sudhir Kumar Sirohi, DHJS**

**NCB Vs. Ankit Sagar
Crime No. VIII/35/DZU/2022**

18.09.2024

Present: Mr. Mukesh Malik, Ld. SPP for NCB.
Ms. Manvi Gupta and Mr. Vineet Chawla, Ld.
Counsels for accused/applicant.

Arguments on bail application of the accused already heard.

Ld. counsel for accused argued that present application has been filed on the ground of violation of order no. 1/88 as the same has not been followed by the officials of NCB while collecting samples in the present matter. It is further argued that the homogeneous sampling which has been done in this matter is not in consonance with the law laid down by Hon'ble High Court of Delhi in the bail application titled as Laxman Thakur Vs. State Bail Appl. no. 3233/2022 decided on 14.12.2022. It is further argued by the Ld. counsel for accused that sampling on the spot itself was wrong therefore, the proceedings u/s 52A conducted in this matter are also in violation of standard procedure prescribed under order no. 1/88. Ld. counsel for accused further argued that accused is not convicted in any other matter, therefore, bail may be granted to accused.

Ld. counsel for accused relied upon following judgments:-

1. *Amani Fidel Chris Vs. NCB Crl. Appeal No. 1027/2015 decided on 13.03.2020 decided by Hon'ble High Court of Delhi*
2. *Ahmed Hassan Muhammed Vs. Customs 2021 SCC OnLine Del 486*
3. *Gopal Das Vs. NCB 2021 SCC OnLine Del 329*
4. *Laxman Thakur Vs. State bail Application No. 3233/2022 decided by Hon'ble High Court of Delhi on 14.12.2022*
5. *Dalairama Raju @ Raju Vs. State Bail Application no. 3915/2023 decided by Hon'ble High Court of Delhi on 06.12.2023*
6. *Santosh Kumar Pandit Vs. State Bail Application no. 2731/2023 decided by Hon'ble High Court of Delhi on 21.03.2024.*
7. *Tareena Vs. State Bail Application no. 314/2024 decided by Hon'ble High Court of Delhi on 28.02.2024.*
8. *Jasbir @ Jassu Vs. The State, Bail Application no. 471/2023 decided by Hon'ble High Court of Delhi on 24.08.2023*
9. *Mohd. Shafi Vs. State Bail Application no. 1066/2024 decided by Hon'ble High Court of Delhi on 23.04.2024.*
10. *Mohd. Muslim @ Hussain Vs. State Spl Leave Petition no. 915 of 2023 Hon'ble Supreme Court of India.*

Ld. SPP for NCB on another hand opposed the bail application and submitted that it has been categorical held in judgment of *Sumit Tomar Vs. State of Punjab Crl. Appeal No. 1690-1691 of 2012* by Hon'ble Apex Court that mixing of sample is no irregularity and the bail can not be granted to the applicant. Ld. SPP for NCB further argued that in this matter there is recovery of 350grams of methamphetamine from the parcel booked by the applicant through courier boy Deepak, there is

statement of Mr. Deepak also to that effect, there is recovery of mobile chat w.r.t. parcel of accused/applicant with courier boy Mr. Deepak, therefore, there is commercial recovery in this matter, the bar of Section 37 NDPS Act is applicable in this matter and bail may not be granted to accused.

Submissions of both the parties heard.
Judgments/orders perused.

In the *Laxman Thakur (supra)* it was held by Hon'ble High Court of Delhi:-

"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.

The Hon'ble High Court of Delhi has clearly dealt with the judgment of Sumit Tomar in the aforesaid order and despite various opportunities no contrary order/judgment to *Laxman Thakur Vs. State* has been filed by the NCB.

In the present matter, one parcel was seized and the same was opened, inside the parcel two plastic boxes were found, each plastic box as per case of NCB was containing contraband, the contents of each box was tested with DD kit and found to be amphetamine, thereafter, the contents of both the boxes were shifted into one transparent polythene and weight came 350gm.

Therefore, in the present case, whole of the amphetamine were shifted to one polythene bag from two plastic boxes without measuring the weight of alleged contraband in individual plastic box, therefore as per standing order 1/88 the transferring of contents of all packets into one and then drawing a sample from the mixture is not permitted.

2.4 of standing order 1/88 states that "*in the case of seizure of a single package/container, one sample is 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* "

Accordingly, the samples were drawn in this matter after mixing the contents of two packets into one and the same has caused prejudice to the applicant and that sample was sent for 52A NDPS Act proceedings therefore, when the collection of sample is itself faulty then the rigours of 37 NDPS Act will not be applicable. The applicant/accused was arrested on 09.11.2023

and is not convicted in any other case therefore, in the present fact and circumstances, the applicant/accused Ankit Sagar is admitted to bail on following terms and conditions:-

- i. The applicant/accused shall furnish a personal bond and a surety bond in the sum of Rs. 1,00,000/- with two sureties.
- ii. The applicant/accused 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;
- iii. The applicant/accused shall report to the office of NCB on the first Monday of every month;
- iv. In case the applicant/accused changes his address, he will inform the IO concerned and Court;
- v. The applicant/accused shall not leave the country during the bail period and surrender his passport in the court, if the applicant does not have passport then to file affidavit in this regard. LOC be opened against accused.
- vi. The applicant/accused shall not indulge in any criminal activity during the bail period;

vii. The applicant/accused shall not communicate with, or come into contact with any of the prosecution witnesses, or tamper with the evidence of the case.

The observations made hereinabove are only for the purpose of deciding the bail application and will have no bearing on the trial. The application is disposed of in the above terms. Copy of this order be given dasti.

(Sudhir Kumar Sirohi)
ASJ/Spl. Judge, NDPS/N. Delhi
18.09.2024