

\$~5

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

Judgment reserved on: 19.04.2023

Judgment pronounced on: 18.05.2023

+ **BAIL APPLN. 253/2023**

KASHIF

..... Petitioner

Through: Mr Aditya Aggarwal, Mr Naveen
Panwar and Ms Kajol Garg, Adv.

versus

NARCOTICS CONTROL BUREAU

..... Respondent

Through: Mr Subhash Bansal, Senior Standing
Counsel for NCB with Mr Shashwat
Bansal, Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

JASMEET SINGH, (J)

1. This is an application seeking bail in case being Crime No. VIII/19/DZU/2022, under section 8/22(c)/23(c)/29 of the Narcotic Drugs and Psychotropic Substances Act,1985 (“NDPS”).
2. According to the prosecution, the brief facts of the case are:

A. An information was received by Junior Intelligence Officer (JIO) of Narcotics Control Bureau (hereinafter NCB/ the Respondent), Sunil Kumar, whereby it was stated that the parcel bearing AWB No. 7702909491 is lying at DHL Express Pvt. Ltd. Rama Road, Kirti Nagar, New Delhi and was suspected to contain psychotropic substance and in relation thereto the said officer informed the

Superintendent, Sh. Amit Kumar Tiwary who directed another officer Anoop Kumar (JIO) to take necessary action.

- B. In pursuance of the above said directions, a team was constituted and on the same day at around 3pm the team departed from NCB office and reached DHL office at around 3:40pm. Thereafter, at DHL Express office the team disclosed the information to the Supervisor, Mr. Ankur Singh who joined the team as independent witness.
- C. The said parcel was opened in which 11 lace rolls and 3 pieces of clothes were found. After checking one lace roll it was found to contain 120 strips of Tramadol tablets, 10 tablets in each strip. The remaining lace rolls were examined and led to the discovery of total 13200 strips of Tramadol tablets. The panchnama was prepared on the spot i.e., 24.02.2022. The contraband was seized, sealed and deposited in the Malkhana on 24.02.2022. On 25.02.2022, the JIO, Anoop Kumar submitted the seizure report.
- D. On 24.02.2022, during the course of enquiry the above said officials got the information from the owner of the DHL office that the said parcel was booked through a firm OGS Groups by one of the accused, Ganesh Chaudhary. He was apprehended on 25.02.2022 by the team of the Respondent.
- E. On the basis of disclosure statement of Ganesh Chaudhary, on 28.02.2022, second seizure was made at Terminal 3, IGI Airport, New Delhi from the consignment number IZ98X1W70451682510 where recovery of 15000 Zolpidem tablets was made. Further, on 02.03.2023, on the basis of Ganesh Chaudhary's disclosure statement, a recovery of 19440 Tramadol tablets was made from 3 packages at

Global India Express Pvt. Ltd., Mahipalpur, New Delhi.

- F. Ganesh Chaudhary disclosed that the said parcel was sent by co-accused Tamir Ali to be couriered to USA. On the basis of this disclosure statement, the co-accused Tamir Ali was arrested.
- G. Further on 06.03.2022, on initial enquiry, co-accused Tamir Ali allegedly disclosed that his three other associates namely the present Applicant i.e., Kashif and co-accused Rizwan and Zahid who were also involved in sending NRx Tablets to USA, have gone to Himachal on tour and also disclosed they are travelling in a Creta car and will return to Lucknow from Himachal via Delhi in the night of 06.03.2022. Consequently, the Applicant was arrested near Jewar Toll Plaza on 07.03.2022.
- H. The Applicant was involved in sending the parcel to co-accused Ganesh Chaudhary through bus conductor and also provided the address of the consignee on WhatsApp to Ganesh Chaudhary.
3. The learned counsel for the Applicant has pleaded the following submissions: -
- A. The Applicant was arrested merely on the disclosure statement of co-accused Tamir Ali who stated that the Applicant is also involved in the business of sending NRx Tablets abroad. In light of Apex Court's judgment in *Tofan Singh v. State of Tamil Nadu* (CRL Appeal No. 152/2013) decided on 29.10.2020, it is submitted that any statement made by accused under section 67 of NDPS Act either retracted or not is inadmissible in evidence except to the extent of any recovery having been made pursuant to the alleged disclosure statement.

- B. The learned counsel for the Applicant has laid emphasis that there is violation of Standing Order 1/88 in drawing of Samples. He states neither the seizure memo was prepared on the spot nor sampling was done on the spot which is a mandate upon the investigating agency as per Clause 1.5 of the Standing Order 1/88.
- C. He states there is a violation of direction of Apex Court regarding the sampling procedure. The first courier which was recovered by the NCB officials contained 11 lace rolls. The case of the prosecution is that one lace roll was opened and it was found to contain 120 strips of Tramadol tablets wrapped and concealed inside lace roll. Thereafter, one of the strips was opened and found to contain 10 tablets which were taken in a transparent zip-lock pouch and was mixed with all the strips ($120 \times 11 = 1320$) and put in a gunny bag. The same procedure has been adopted by the NCB officials in relation to the other couriers which were allegedly recovered later and hence, they have flouted the procedure laid down by this Hon'ble High Court in *Basant Rai v State*, 2012 SCC OnLine Del 3319.
- D. He states the procedure of sampling has to be done in accordance with the directions given by Apex Court in *Gaunter Edwin Kircher versus State of Goa, Secretariat Panaji, Goa (AIR 1993 SC 1456)* decided on 16.03.1993 in which it was clarified that sample has to be taken from each packet. While in the present set of facts, the NCB officials have not taken the sample from each lace roll, rather sample was taken from only one lace roll, thus, violating the sampling procedure.
- E. The learned counsel for the Applicant submits that no reasonable explanation for delay of application for sampling before magistrate is

given by the respondent. The sample of 10 tablets was taken and was put together with all the strips in a gunny bag. Later on, after around 51 days from the date of collection of last sample on 02.03.2022, on 22.04.2022, application for sampling under section 52A of NDPS Act was presented before the Ld. Magistrate. It is trite law laid down in *Union of India v. Mohanlal (2016) 3 SCC 379* decided on 28.01.2016 that the application to the Magistrate for sampling has to be moved immediately after seizure. In the present case, the application under section 52A for drawing of sample was made after inordinate delay of around 51 days.

- F. He also states that the samples which were taken at the time of seizure were presented before the Magistrate, for drawing the sample on 22.04.2022, were sent to FSL only on 18.08.2022, while Standing Order 1/88 dated 15.03.1988 clearly mandates that the samples have to be sent for FSL analysis within 72 hours from the date of seizure.
- G. It is stated by Mr. Aggarwal, learned counsel for the applicant, that the delay in moving an application under section 52A NDPS is fatal to the case of the prosecution.
- H. He relies on the Hon'ble Supreme Court's judgment in *Noor Aga v. State of Punjab & Anr.* in *CRIMINAL APPEAL NO. 1034 OF 2008, (2008) 16 SCC 417* to contend that guidelines in the Standing Order should be substantially complied with.
- I. The learned counsel also submits that no recovery of any kind was effected from the Applicant, meaning thereby the entire story of prosecution rests on the disclosure statement of the co-accused Tamir Ali wherein he allegedly disclosed the name of the Applicant. He

further states that the bus conductor/s was the carrier of alleged contraband from the applicant to Ganesh Chaudhary but there is no whisper as to the identity of the bus conductor/s or bus driver/s and they have not been made a witness in the present case.

J. It is also submitted that there is no evidence of direct money transaction between the Applicant and co-accused Ganesh Chaudhary or between the Applicant or the customers overseas when it was alleged that the Applicant was dealing in the business of sending the parcels of NRx Tablets to the customers abroad through co-accused Ganesh Chaudhary who allegedly used to courier the parcels from Delhi to foreign countries. He also states that the investigation has been completed and there is no whisper in the entire complaint of 'source' from where these tablets were procured by the Applicant and co-accused persons.

4. *Per contra* Mr. Bansal, learned standing counsel for the Respondent argues the following:

A. He states that there is no delay in filing application under Section 52A of the NDPS Act. He states that the Act does not provide any statutory time frame in moving an application for drawing of sample before the Magistrate under Section 52A of the NDPS Act. Relying on the judgment of *Mohanlal (supra)*, he states that the Hon'ble Supreme Court categorically declined from stipulating any exact time period for the purposes of making an Application under section 52A before the Magistrate seeking drawing of samples and correctness of inventory.

- B. Even assuming, without admitting, that there was a delay in moving application under Section 52A of the NDPS Act, he states that the applicant is barred from raising this issue today. The application under Section 52A of the NDPS Act for collection of samples was filed on 22.04.2022 in the presence of the applicant and/or his counsel. The applicant at that point in time raised no objection to collection of sample and had he raised the objection, the respondent would have furnished explanation that: (a) there was no delay and; (b) the reasons for the alleged delay, if any. As of today, the application under section 52A stood filed and allowed. Therefore, the applicant is barred from raising the said issue today.
- C. Mr. Bansal, learned standing counsel states that the delay has been considered fatal in some of the cases as the samples were capable of being tampered with. In the present case, the contraband comprised of strips which were seized and the seizure memo dated 24.02.2022 duly mentioned that the strips were in a sealed form and the godown receipt also shows that there was no tampering with the contraband.
- D. For the said reasons, he states that no prejudice has been caused to the applicant for delay, if any, in filing an application under Section 52A of the NDPS Act.
- E. He contends that the rule of interpretation namely, *casus omissus* provides that what has been omitted in the Statute or in other words, basically a situation not supported under the Statute, cannot be supplied by a court of law by construing the same in the name of interpreting the Statute. If in the name of interpretation of a Statute, the court of law supplies something which is not otherwise stated in

the Statute by the Legislature, then it would amount to legislating by the Court in the name of interpretation, hence is impermissible under Constitution. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court in *Chief Information Commissioner & Anr. v. State of Manipur & Anr. (2011) 15 SCC 1* to contend that a judgment of a court cannot be interpreted or taken as a provision of statute. The relevant paras of the said judgment read as under:

“40. It is well known that when a procedure is laid down statutorily and there is no challenge to the said statutory procedure the Court should not, in the name of interpretation, lay down a procedure which is contrary to the express statutory provision. It is a time-honoured principle as early as from the decision in Taylor v. Taylor [(1875) 1 Ch D 426 (CA)] that where a statute provides for something to be done in a particular manner it can be done in that manner alone and all other modes of performance are necessarily forbidden. This principle has been followed by the Judicial Committee of the Privy Council in Nazir Ahmad v. Emperor [(1935-36) 63 IA 372 : AIR 1936 PC 253 (2)] and also by this Court in Deep Chand v. State of Rajasthan [AIR 1961 SC 1527 : (1961) 2 Cri LJ 705] , AIR at para 9 and also in State of U.P. v. Singhara Singh [AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2)] reported in AIR at para 8.

... ..

47. It is well known that the legislature does not waste words or say anything in vain or for no purpose. Thus, a construction which leads to redundancy of a portion of the statute cannot be accepted in the absence of compelling reasons. In the instant case there is no compelling reason to accept the construction put forward by the respondents.”

F. He has relied on the judgment of *Arvind Yadav In JC Through His Pairokar v. Govt Of NCT Delhi Through Standing Counsel* in BAIL APPLN. 1416/2021 (2021:DHC:1965) wherein a coordinate bench of this court while considering the issue of non-compliance of Section 52A NDPS and whether petitioner is entitled to bail on this ground alone, observed as under:

“13. By this petition, petitioner seeks bail on the ground of noncompliance of Section 52A of the NDPS Act, however, in view of the fact that the trial does not stand vitiated by drawing the samples at the spot in the absence of a Magistrate for being sent to FSL analysis for filing a appropriate charge-sheet before the Special Court for ascertaining the nature of contraband and whether the sanctity of drawing the samples was vitiated for the non-presence of the Magistrate would be an issue to be seen during the course of trial, hence this Court finds no ground to grant bail to the petitioner on this ground.”

G. Lastly, he states that these are all issues of defence which are being raised by the applicant and can only be adjudicated after trial.

ANALYSIS

5. I have heard learned counsel for the parties.
6. At the time of arguments, the learned counsel for the Applicant has restricted his arguments to violation of the Standing Order 1/88 and delay in filing the application before the Magistrate for drawing the sample under section 52A NDPS.

7. Therefore, the question for determination before me is what is a reasonable time to make an application to the Magistrate under section 52A NDPS and the effect of delay, if any?
8. Section 52A NDPS 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 sub-section (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 sub-section (2), the Magistrate shall, as soon as may be, allow the application.

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

9. Clause 1.5 and 1.13 of Standing Order 1/88 is reproduced below :-

“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 mention to this effect should invariably be made in the panchnama drawn on the spot.*

... ..

1.13. Mode and Time limit for dispatch of sample to Laboratory:
The samples should be sent either by insured post or through

*special messenger duly authorized for the purpose. Despatch of samples by registered post or ordinary mail should not be resorted to. Samples **must** be dispatched to the Laboratory within 72 hours of seizure to avoid any legal objection.”*

Ambiguity between Standing Order 1/88 and Section 52A NDPS

10. Although, the new notification published on 23 December 2022 repeals Standing Orders 1/88 and 1/89, thereby clarifying and removing the ambiguity by mandating drawl of sample to be carried out as per Section 52A(2) NDPS, the same cannot be applied retrospectively.
11. The judgment of *Noor Aga (supra)*, wherein the Supreme Court was dealing with Standing Order 1/89, accords sanctity to the executive instructions by observing as under:

“89. Guidelines issued should not only be substantially complied with, 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.

90. Recently, this Court in State of Kerala v. Kurian Abraham (P) Ltd. [(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.

91. The 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 with 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.”

12. The punishments provided under the NDPS Act are punitive and therefore, to balance the interests of an accused, it is imperative that a strict compliance of the provisions of the law are made.
13. The Supreme Court in *Mohanlal (supra)* considering both, the Standing Order 1/89 and Section 52A emphasized that even under section 52A NDPS Act, application for drawing of samples and certification must be made without any delay. The Court, whilst being conscious of the obfuscation created in view of Standing Order 1/89 and Section 52A NDPS, observed as under:

“Seizure and Sampling

12. Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government has in exercise of that power issued Standing Order No. 1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10-5-2007 and the other dated 16-1-2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of Standing Order No. 1 of 1989 states that samples

must be taken from the seized contraband on the spot at the time of recovery itself. It reads:

“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 witnesses (panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.”

... ..

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

19. Mr Sinha, learned Amicus Curiae, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification, etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be

*followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. **The scheme of the Act in general and Section 52A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions.***

... ..

31. To sum up we direct as under:

31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate

as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading “seizure and sampling”. The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order.” (emphasis supplied)

14. Pertinently, a coordinate bench of this court granted bail due to non-compliance of procedure under section 52A and Standing Order 1/89 in *Amani Fidel Chris v. Narcotics Control Bureau* 2020 SCC OnLine Del 2080 by observing as under:

“15. In view of the stringent provisions of the NDPS Act, the issue to be considered is whether the procedure specified under the Standing Orders can be flouted.

... ..

32. In the opinion of this court, the procedure adopted by the respondent in the present case for drawing samples neither conforms to the procedure prescribed under Section 52A of NDPS Act nor under the Standing Orders. At the cost of repetition, the respondent neither filed any application before the Magistrate for drawing the samples under his supervision nor followed the procedure of drawing a representative sample outlined in paras 2.4 or 2.5 read with 2.8 of the Standing Order 1/89.”

15. The aforesaid discussion makes it clear that Section 52A NDPS does not give a time frame within which application has to be made for collection of sample to the magistrate. The time frame is provided in Standing Order 1/88 and that too, only in the context of sending the sample to FSL.

16. Guidelines prescribed in the Standing Orders cannot be flouted and their substantial compliance must be insisted upon as observed in *Noor Aga (supra)*. This court has already held Standing Order 1/88 to be mandatory in the judgment of *Laxman Thakur v. State* in BAIL APPLN. 3233/2022 (2022/DHC/005591).

Resolving the Ambiguity

17. If the argument of the respondent is accepted that Section 52A of the NDPS Act does not contemplate a timeframe within which the application is to be moved, the same would be contrary to the legislative intent. It is settled principle of law that where a statute does not provide a particular time limit, the same can be inferred from the guidelines and/or has to be within reasonable time.
18. In *Mohanlal (supra)*, the Hon'ble Supreme Court in para 19 has opined that “*...The scheme of the Act in general and Section 52A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time-frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay...*”. What is reasonable has been left open by the Apex Court in the said judgment.
19. It cannot be the intent of the legislature that since no time limit is mentioned in the statute, the respondent authorities can take their own sweet time in moving an application under section 52A NDPS. Rather, the said application should be moved at the earliest to prevent the apprehension of tampering with the samples as the seizure, quantity

and quality of contraband is the most crucial evidence in NDPS cases and drawing of sample and certification in the presence of magistrate is of utmost importance.

20. Thus, a harmonious and combined reading of Standing Order 1/88 and Section 52A NDPS construes that a reasonable time must be read into section 52A(2) for making an application for drawing the sample and certification before the Magistrate.

Effect of Delay

21. Respondents' have placed reliance on the judgment of *Arvind Yadav (supra)*, passed by a coordinate bench of this court, which held that violation of section 52A due to absence of Magistrate at the time of drawing the sample did not vitiate the trial and hence, the accused is not entitled to bail.
22. Though the court in *Arvind Yadav (supra)* held that the trial is not vitiated in the facts and circumstances therein, but the pertinent question arises whether it gives a reasonable apprehension that the seized sample was not properly preserved in custody of the prosecuting agency and/or tampered with?
23. The reason for strict time frame and collection of sample has been elucidated by a coordinate bench of this court in the judgment of *Rishi Dev @ Onkar Singh v. State* (2008:DHC:1513) in CRL.A. No. 757/2000 decided on 01.05.2008 wherein it was observed as under:

“8....The above passage shows that there is a time limit of 72 hours stipulated by the Narcotics Control Bureau for a seized sample to be deposited with the Chemical Examiner for

*testing. This rule is salutary because any attempt at tampering with the sample recovered from the accused can have fatal consequences to the case of the prosecution. **Strict compliance has to be insisted upon in such an event.***

... ..

*19. This Court is unable to agree with the approach adopted by the trial court, especially its observations highlighted above. The record of the case should contain entry in writing about the sample being sent for testing within the time specified by the Narcotic Control Bureau. **A strict compliance of this requirement has to be insisted upon. The reason is this. The sample that is kept in a police malkhana, under the seals of the police officers themselves, is still definitely under the control of those police officers. There is every possibility that the samples could be tampered and again re-sealed by the very same officers by again affixing their seals. It is to prevent this from happening that earlier the sample is sent for testing to the CFSL the better.**" (emphasis supplied)*

24. Hence, I am of the view that non-compliance of section 52A within a reasonable time gives rise to the apprehension that sample could have been tampered with and in case of a wrongly drawn sample, the benefit of doubt has to accrue to the accused. The prosecuting agency has to prove at the time of trial that the sample was immune from tampering.
25. In the present case, the sample was kept in the custody of the prosecuting agency for more than one and a half month, thus, raising doubt with regards to tampering of the same.
26. Another reason which persuades me to take this view is that once the Apex Court has held in *Mohanlal* (supra) that the application under 52A has to be made without any undue delay, there should not be any

reason for delaying the filing of application.

27. The application for sample collection under section 52A is not a technical application wherein elaborate reasons, principles of law or detailed facts are required. It is more of a clerical application and should mandatorily be made within a reasonable time under section 52A NDPS. The application has to be moved at the earliest and in case, the same has not been moved, the reasons for delay must be explained by the authorities.

Reasonable time under section 52A

28. What is reasonable time depends on the facts and circumstances of each case. However, it cannot be the intention of the legislature that an application for sample collection can be moved at the whims and fancies of the prosecuting agency. Therefore, taking cue from the Standing Order 1/88, it is desirable that the application under 52A should be made within 72 hours or near about the said time frame.
29. In the present case, the application for drawing of sample and certification of seizure memo under section 52A NDPS was filed on 22.04.2022 i.e., after 51 days from the period of last seizure on 02.03.2022.
30. A period of 51 days, by no stretch of imagination, can be called a reasonable period for filing an application under section 52A NDPS for drawing the sample. It cannot be that the contraband lying in the custody of the Narcotics Department for 51 days, in their power and possession, is immune from tampering and mischief. Furthermore, no reasons have been furnished by the Respondent for the delay of 51 days

for moving an application under section 52A NDPS.

31. In view of the above discussion, I hold that violation of Section 52A vitiates the sample collection procedure and the benefit of the same must accrue to the Applicant.
32. The application by the respondent under section 52A was filed after a delay of 51 days. At that time, the applicant did not object. However, the same being a legal objection can be raised at any stage.
33. The applicant has been in custody since 07.03.2022 and more than a year has passed since then. No further custodial interrogation of the Applicant is required. No recovery was made from the Applicant or at his instance. Therefore, the embargo of Section 37 NDPS is not applicable on the Applicant.
34. The triple test i.e., a) flight risk; b) tampering with evidence and c) influencing the witnesses can be taken care of by imposing stringent bail conditions.
35. For the aforesaid reasons, the application is allowed and the applicant is granted bail 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 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;
- iv. The Applicant shall join investigation as and when called by the I.O. concerned;
 - v. In case the Applicant changes his address, he will inform the I.O. concerned and this Court also;
 - vi. The Applicant shall not leave the country during the bail period and surrender his passport, if any, at the time of release before the Trial Court;
 - vii. The Applicant shall not indulge in any criminal activity during the bail period;
 - viii. The Applicant shall not communicate with or come into contact with any of the prosecution witnesses or tamper with the evidence of the case.
36. The observations made hereinabove are only for the purposes of the deciding the present bail application. They shall not have any bearing in the deciding the merits of the case.
37. The application is allowed and disposed of.
38. The documents handed over in court are taken on record.

JASMEET SINGH, J

MAY 18, 2023 / jv

[Click here to check corrigendum, if any](#)