

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL MISCELLANEOUS No.59310 of 2024

Arising Out of PS. Case No.-16 Year-2023 Thana- D.R.I District- Patna

=====
Amit Kumar S/O Shri Vishnu Prasad Singh R/O Village- Khilwat, ward No-1,
P.S- Bidupur, Distt.- Vaishali, Bihar-844503.

... .. Petitioner/s

Versus

Union of India Through Directorate of Revenue Intelligence, Regional Unit,
Patna. Bihar

... .. Opposite Party/s

=====
NDPS Act---section 21, 23, 29, 35, 37, 52A, 54, 67--- clubbing of the quantity
of contraband recovered from two or more co-accused---Petition for Regular
Bail---allegation against Petitioner and 3 other co-accused persons is of recovery
of 306.70 gms of heroin---*Findings:* Any lapse or delay in compliance of
Section 52A by itself would neither vitiate the trial nor would entitle the accused
to be released on bail. The Court will have to consider other circumstances and
the other primary evidence collected during the course of investigation, as also
the statutory presumption permissible under Section 54 of the NDPS Act---
quantity of contraband seized assumes relevance at the stage of considering the
bail application of the accused under Section 37 of the Act--- where there is
evidence to suggest the abatement/or criminal conspiracy, the quantity of
contraband recovered individually could be combined for determining as to
whether it is a 'commercial quantity'--- the petitioner along with the three other
co-accused were apprehended for smuggling of heroin from Assam to Hajipur
and from perusal of CDR, 14 phone calls were made between the petitioner and
the other co-accused on the date of occurrence---there was recovery of
contraband from all accused persons---there is ample material on record to
establish conspiracy between the petitioner and the co-accused as they were
found to be in "joint possession" of 306.70 grams of contraband and have failed
to give a legitimate justification for the possession of the same--- quantum of
recovery being more than commercial quantity, this court having regard to the

bar under Section 37 of the NDPS Act is not inclined to allow the petitioner,
privilege of bail---petition rejected. **(Para 5-9)**

2024 SCC OnLine SC 3848, 2023 SCC OnLine Del 7732, (2005) 7 SCC 550

.....Relied Upon.

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Appearance :

For the Petitioner/s	:	Mr. Prasoon Shekhar, Advocate
	:	Mr. Rajesh Kumar, Advocate
For the Union of India	:	Mr. Sanchay Srivastava, Sr. Standing Counsel
	:	Mr. Ankit Kumar Singh, Jr. Standing Counsel
	:	Mr. Sushant Srivastava, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA

ORAL ORDER

5 31-01-2025 Heard Mr. Prasoon Shekhar learned counsel on behalf of petitioner assisted by Mr. Rajesh Kumar and Mr. Sanchay Srivastava, Senior Standing Counsel on behalf of Union of India assisted by Junior Standing Counsel Mr. Ankit Kumar Singh and Mr. Sushant Srivastava.

2. As per prosecution case, on 02.11.2023 Mithun Bhardwaj, Intelligence Officer, DRI, apprehended four persons namely, Apu Shuklabaidya, Ajit Bora, Madan Dey and Amit Kumar on the basis of a specific information near Durga mandir outside Hajipur Railway Station, Bihar. During search, six packets of heroin concealed in six soap cases were recovered from the possession of Apu Shuklabaidya, 13 packets of heroin



concealed in 13 soap cases were recovered from the possession of Ajit Bora and six packets of heroin concealed in six soap cases were recovered from the possession of Madan Dey. On weighing, net weight of the heroin came around to 306.70 grams. All the four accused persons in their statements under Section 67 of NDPS Act admitted their guilt of conscious possession, carriage and transportation of the seized heroin in lure of money. Accordingly, search-cum-seizure list has been prepared and the present case has been registered under Section 21, 23 and 29 of NDPS Act against all accused persons.

3. Learned counsel for the petitioner submitted that petitioner has been falsely implicated in this merely on the basis of suspicion. He next submits that in the arrest memo dated 03.11.2023 against the ground of arrest at serial no. 9, it has been mentioned '*ganja ki taskari*'. Hence, the ground besides being contradictory to the case of the DRI in the complaint cannot be the cogent reason for the arrest/detention of the petitioner. He next submits that petitioner was arrested in a routine and casual manner without recording reasons as necessitated by law. For this, he relied on the judgment of ***Prabir Puryakastha v. State (NCT of Delhi), 2024 SCC OnLine SC 934*** wherein the Apex Court held that:



20. Resultantly, there is no doubt in the mind of the Court that any person arrested for allegation of commission of offences under the provisions of UAPA or for that matter any other offence(s) has a fundamental and a statutory right to be informed about the grounds of arrest in writing and a copy of such written grounds of arrest have to be furnished to the arrested person as a matter of course and without exception at the earliest. The purpose of informing to the arrested person the grounds of arrest is salutary and sacrosanct inasmuch as, this information would be the only effective means for the arrested person to consult his Advocate; oppose the police custody remand and to seek bail. Any other interpretation would tantamount to diluting the sanctity of the fundamental right guaranteed under Article 22(1) of the Constitution of India. The language used in Article 22(1) and Article 22(5) of the Constitution of India regarding the communication of the grounds is exactly the identical. Neither of the constitutional provisions require that the 'grounds' of "arrest" or "detention", as the case may be, must be communicated in writing. Thus, interpretation to this important facet of the fundamental right as made by the Constitution Bench while examining the scope of Article 22(5) of the Constitution of India would ipso facto apply to Article 22(1) of the Constitution of India insofar the requirement to communicate the grounds of arrest is concerned.

30. Hence, we have no hesitation in reiterating that the requirement to communicate the grounds of arrest or the grounds of detention in writing to a person arrested in connection with an offence or a person placed under preventive detention as provided under Articles 22(1) and 22(5) of the Constitution of India is sacrosanct and



cannot be breached under any situation. Non-compliance of this constitutional requirement and statutory mandate would lead to the custody or the detention being rendered illegal, as the case may be.

31. Furthermore, the provisions of Article 22(1) have already been interpreted by this Court in Pankaj Bansal (supra) laying down beyond the pale of doubt that the grounds of arrest must be communicated in writing to the person arrested of an offence at the earliest. Hence, the fervent plea of learned ASG that there was no requirement under law to communicate the grounds of arrest in writing to the accused appellant is noted to be rejected.

3.i. He further submitted that there has been non-compliance with the mandatory provision of Section 52A of the NDPS Act,1985 which vitiates the search and seizure process for which learned counsel relied on the following cases:

a. ***Amjad Khan v. State of Rajasthan, 2024 RJ-***

JD 24228:

“Having regard to the facts and circumstances of the case and having considered deposition in respect of section 52A of the act and other arguments addressed by counsel for the applicant, as noted above from the challan papers and evidence produced, it prima facie did not show the compliance of section 52A of the Act and seizure by competent and authorized officer, in its true spirit. In such a situation, it assumes importance that in absence of proper explanation from the prosecution, it prima facie significantly undermines the case of the prosecution and thus, the entire search and seizure proceedings are prima facie vitiated.”



*b. Ibrahim Khwaja Miya Sayyed v. State of
Maharashtra, 2023 SCC OnLine Bom 2873:*

*“The records also indicate that the investigating agency has not drawn samples independently from both the bags, but had mixed together the entire contraband in both the bags and thereafter drawn two samples, one of which was forwarded to CFSL for analysis. The Delhi High Court in *Amani Fidel Chris vs. Narcotics Control Bureau CRL Appeal No.1027 of 2015* and *Ram Bharose (supra)* has considered the Standing Order 1 of 88, which is pari material with Standing Order 1 of 89 and has held that “Mixing of the contents of container/package (in one lot) and then drawing the representative samples is not permissible under the Standing Orders and rightly so since such a sample would seized to be a representative sample of the corresponding container/ package”. In the instant case, as noted above, the sample sent to CFSL was not the representative sample. Considering this vital aspect, in my considered view the Applicant Megha would be entitled for bail.”*

3.ii. He further submitted that all Central agencies are required to mandatory comply with the requirements of videography of the recovery proceedings under NDPS Act and the respondents in the instant case failed to do so. He relied on the decision of Calcutta High Court in *Kalu S.K., In re, 2022 SCC OnLine Cal 4556* where it was held that :

*“11. The observations made in *Shafhi Mohammad (supra)* as well as the*



guidelines in the Field Officers' Handbook issued by the Narcotics Control Bureau reinforce our view regarding mandatory videography of recovery proceedings under NDPS Act. Technology has advanced considerably and equipments like smartphones and other electronic devices enabling videography are ordinarily available with seizing officers. Hence, lack of availability of technology or awareness is a non-issue.

12. Accordingly, we direct as follows: —

(i) In all cases involving recovery of narcotic substance particularly recovery of narcotic above commercial quantity, seizing officers shall make a video recording of the entire procedure unless for reasons beyond the control of seizing officers, they are unable to do so;

(ii) Reasons for failing to videograph the recovery proceeding must be specifically recorded in the investigation records particularly contemporaneous documents including seizure/inventory list;

(iii) Superior Police Officer not lower than the rank of Additional Superintendent of Police shall monitor recovery of narcotic substance above commercial quantity within their territorial jurisdiction and ensure due compliance of statutory provisions regarding search and seizure including compliance of the directives (i) and ii) relating to videography of recovery and/or recording of adequate reasons for departure from such procedure;

(iv) Non-compliance of the directives (i) and ii) relating to videography of recovery and/or failure to record just reasons in contemporaneous documents for its non-compliance would attract departmental



proceeding so far as the seizing officer is concerned;

(v) Director General of Police shall issue necessary directions for due compliance with the aforesaid directives;

(vi) Superintendent of Police/Commissioner of Police in each district/commissionerate shall undertake training programmes to spread awareness and capacity building of officers regarding compliance of statutory requirements in the matter of search and seizure of narcotic substance under NDPS Act and compliance of the aforesaid directives relating to videograph of recovery including collection, preservation and production of such electronic evidence in Court.”

3.iii. Learned counsel for the petitioner next submits that in the absence of transcript of conversations exchanged between co-accused persons, mere call details would not be considered as a corroborative material. He relied on the case of *Vikrant Singh v. State of Punjab, 2022 SCC OnLine P&H 3584* wherein it was held:

*“11. In judgment of the Gujarat High Court in Yash Jayeshbhai Champaklal Shah's case (supra), it has been observed as under:-
“Having heard learned advocates for the appearing parties, it emerges on record that the applicant is not found in possession of any contraband article. Over and above that, the call data records may reveal that in an around the time of incident, he was in contact with the co-accused who were found in possession of contraband. Since there is no recording of conversation in between the accused, mere contacts with the*



co-accused who were found in possession cannot be treated to be a corroborative material in absence of substantive material found against the accused.”

12. A perusal of the above judgment would show that without the transcript of the conversations exchanged between the co-accused, mere call details would not be considered to be corroborative material in absence of substantive material found against the accused. In the present case, there is no other material against the petitioners.

3.iv. He further submitted that the Investigating Officer being the Complainant in the instant case should have refrained himself from investigating the case as it would negate the very concept of fair and impartial investigation. In the case of *Arjun Singh v. State of Punjab, 2023 SCC OnLine P&H 1044*, it was held that:

In the present case the investigating officer, SI Makhan Singh- PW3 is also the complainant of the case. He should have refrained himself from investigating the case as this would negate the concept of fair and impartial investigation which is the bedrock of the principle of fairness of official action in terms of Article 21 of the Constitution of India. The Hon'ble Supreme Court in State by Inspector of Police, Narcotic Intelligence Bureau, Madurai, Tamil Nadu v. Ranjagam 2010(15) SCC 369, reaffirmed that since the arrest and search is made by the complainant, he should not involve himself with the investigation of the case. Such an officer leading the investigation would forthrightly raise questions as to the fairness and impartiality of the said investigation



process. Following the suit, a Division Bench of Calcutta High Court in Laltu Prasad v. The State of West Bengal 2017(2) RCR(Criminal) 237 set aside a conviction in view of delayed depositing of sample and the complainant acting as the investigating officer. Similarly, the Hon'ble Supreme Court in Megha Singh v. State of Haryana 1996(11) SCC 709, opined that the complainant who had intercepted the accused, recovered the arms and registered the case should have recused himself from the investigation as it raises doubts regarding the impartial nature of the investigation. Free and fair trial inspiring confidence in the public is the cornerstone of the criminal justice system.

3.v. He further submitted that whenever contraband's are seized, the quantity seized has to be equally divided among the people who were found to be in possession of such quantity and if the divided quantity is lesser than the commercial quantity, then the rigorous of Section 37 would not apply. For this he relied upon the case of ***Etamshetty Rajababu v. The State of Andhra Pradesh, Crim. Petition No. 2518/ 2018*** where the High Court has held that:

“Counsel for the petitioner submits that there are four accused in this case' and that when the quantity seized is divided among them, it falls below the commercial quantity and, hence, it cannot be considered as a case involving commercial quantity. In support of his submission, he relies on the orders of this Court, dated 08.03.2017, passed in Criminal Petition Nos. 1501 and 1508 of 2017 and Criminal Petition No.12155 of 2015, dated 26.11.2015, from which, it can be understood that this Court



took a view that when contraband is seized, the quantity seized has to be equally divided among the people, who were found to be in possession of such quantity and, if, on such division, the quantity is lesser than the commercial quantity, Section 37 of the NDPS Act will not be a hurdle for grant of bail. The ratio seems to be rational, since, all the accused dealing with commercial quantity would not be benefited by the proceeds of the whole quantity, but, would be benefited only by the proceeds of their share of contraband, which probably would be equal.”

3.vi. He further submitted that bail can be granted to an accused where there is no recovery from the possession of accused and CDRs do not disclose the actual conversation that transpired between the accused. In ***Amandeep Singh v. State of U.T. Chandigarh, CRM-M-13595-2024*** it was held that:

“A perusal of the aforementioned judgments would show that bail can be granted to an accused where he has been named in a disclosure statement of his co-accused but there is no recovery from him on his arrest and the CDRs do not disclose the actual conversation that transpired between the accused from whom the recovery was effected and the one named in the disclosure statement.”

3.vii. He further submits that rigorous imprisonment under Section 37 of the NDPS Act would not apply in the present case since there are serious procedural non-compliance and the petitioner is a person of clean antecedents. For this he relied on the following judgments:



a. Amal v. State of Kerela, Bail Application No.**1790/2024:**

“16. It is to be remembered that it is after a cleavage of opinion on the interpretation of the Standing Orders/Instructions on the procedure to be followed in the drawal, storage, testing and disposal of samples seized under the Act, that the Central Government has framed the above Rules, making it mandatory to draw representative samples from each seized package/container.

27. In Dheeraj Kumar Shukla v. The State of Uttar Pradesh [2023 SCC OnLine SC 918], the Hon’ble Supreme Court has held that the second limb under Section 37 of the NDPS Act can be diluted if the accused has no criminal antecedents.

28. On an overall conspectus of the facts, rival submission made across the Bar, the law referred to the afore-cited judgments and my findings rendered above, particularly regarding the infraction of the statutory provisions by the Detecting Officer, which has obviously caused prejudice to the petitioner, and on comprehending the fact that petitioner has no criminal antecedents, I find that there are reasonable grounds to hold that the petitioner has not committed the alleged offence and is not likely to commit the offence. Therefore, the rigour under Section 37 of the NDPS Act stands diluted and the petitioner is entitled to be released on bail.”

b. Rashid @ Lallu v. Narcotics Control Bureau,**2023:AHC-LKO:48130:**

“9. It is also clearly well settled that Section 37 of the Act and the twin conditions have to be necessarily considered by the court



while deciding the bail application. In the present case, the scope of twin conditions specified in Section 37 have been specifically considered by the Hon'ble Supreme Court in the case of Mohd Muslim @ Hussain vs. State (NCT of Delhi) reported in 2023 LiveLaw (SC) 260 wherein the Hon'ble Apex Court has explained the scope of twin conditions of Section 37 as under:-

"18. The conditions which courts have to be cognizant of are 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 on bail. What is meant by "not guilty" when all the evidence is not before the court? It can only be a prima facie determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even



in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to – in cases when accused of offences enacted under special laws – be balanced against the public interest.

19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India vs. Ratan Malik). Grant of bail on



ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having 19 (2009) 2 SCC 624 regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail. "

12. The second condition of the twin conditions prescribed under Section 37 of the Act with regard to the criminal antecedent, it is necessary to note the law laid down and explained by the Hon'ble Supreme Court in the case of Ranjitsingh Brahmajeetsing Sharma vs. State of Maharashtra and Another reported in (2005) 5 SCC 294 decided in the Criminal Appeal No.523 of 2005 wherein the Hon'ble Apex court had recorded that for forming a view that the applicant will not engaged in the similar offence in future, the criminal antecedent is a guiding factor. In the present case as the applicant has no criminal antecedents, I can form a view that applicant if enlarged on bail is not likely to commit any offence.

3.viii. It is further submitted that the accused is entitled to bail as the sampling has not been done in terms of Section 52A of the NDPS Act and the issue can be considered at the stage of bail. He relied on ***Tareena. v. State NCT of Delhi, MANU/DEOR/85694/2024*** where it was stated:

11. In Noor Aga (supra), dealing with a case where the alleged recovery was of 1.4 kgs heroin from a cardboard container, the Supreme Court observed as under:-

87. Preservance of original wrappers, thus, comes within the purview of the direction issued in terms of Section 3.1 of Standing



Order 1 of 1989. Contravention of such guidelines could not be said to be an error which in a case of this nature can conveniently be overlooked by the court. We are not oblivious of a decision of this Court in South Central Railway v. G. Ratnam [(2007) 8 SCC 212: (2007) 2 SCC (L&S) 851] relating to disciplinary proceedings, wherein such guidelines were held not necessary to be complied with, but therein also this Court stated:(SCC p. 222, para 23)

23. In the cases on hand, no proceedings for commission of penal offences were proposed to be lodged against the respondents by the investigating officers."

xxx xxx xxx

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 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 04/03/2024 at 21:05:30 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.”

3.ix. Burden of proof under Section 35 of the NDPS Act shifts onto accused only when the prosecution is able to establish prima-facie case beyond reasonable doubt. For this he relied on ***Vijay Pandey v. State of U.P., (2019) 18 SCC 215:***

“In Mohan Lal vs. State of Punjab, AIR 2018 SC 3853, it was observed:

“10. Unlike the general principle of criminal jurisprudence that an accused is presumed innocent unless proved guilty, the NDPS Act carries a reverse burden of proof under Sections 35 and 54. But that cannot be understood to mean that the moment an allegation is made and the F.I.R. recites compliance with statutory procedures leading to recovery, the burden of proof from the very inception of the prosecution shifts to the accused, without the prosecution having to establish or prove anything more. The presumption is rebuttable. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. The stringent provisions of the NDPS Act, such as Section 37, the minimum sentence of ten



years, absence of any provision for remission, do not dispense with the requirement of the prosecution to establish a prima facie case beyond reasonable doubt after investigation, only after which the burden of proof shall shift to the accused. The case of the prosecution cannot be allowed to rest on a preponderance of probabilities.””

3.x. Since the case has to be dealt primarily on the basis of documentary evidence, detention in custody is not warranted. Learned counsel relied on the decision of Calcutta High Court in ***Barun Pramanik, 2017 SCC OnLine Cal 4767-***

“It however, appears that sufficient progress in investigation has been made by the investigating officer; relevant documents have been seized and the statements of available witnesses recorded, both under sections 161 and 164 of the Code of criminal Procedure. The offences with which the petitioner has been charged, has to be proved primarily on the basis of the documentary evidence, a major part of which has been seized by now. Despite seriousness of the offence that is alleged to have been committed by the petitioner with the aid of his associates, we are of the considered view having regard to the facts and circumstances, more particularly the fact that the petitioner not too long ago was holding a responsible position, that his detention in custody for the purpose of interrogation is not warranted and that he is entitled to direction, as prayed for in this application.”

4. Learned counsel for the respondent, at the very outset, submitted that the petition filed by the petitioner is wholly misconceived, *prima-facie* unsustainable on the facts as



well as on the law and thus liable to be dismissed as such. He further relied on the decision of the Apex Court in the case of ***Narcotics Control Bureau v. Kashif, 2024 INSC 1045*** wherein it was laid down that:

“(i) The provisions of NDPS Act are required to be interpreted keeping in mind the scheme, object and purpose of the Act; as also the impact on the society as a whole. It has to be interpreted literally and not liberally, which may ultimately frustrate the object, purpose and Preamble of the Act.

(ii) While considering the application for bail, the Court must bear in mind the provisions of Section 37 of the NDPS Act which are mandatory in nature. Recording of findings as mandated in Section 37 is sine qua non is known for granting bail to the accused involved in the offences under the NDPS Act.

(iii) The purpose of insertion of Section 52A laying down the procedure for disposal of seized Narcotic Drugs and Psychotropic Substances, was to ensure the early disposal of the seized contraband drugs and substances. It was inserted in 1989 as one of the measures to implement and to give effect to the International Conventions on the Narcotic drugs and psychotropic substances.

(iv) Sub-section (2) of Section 52A lays down the procedure as contemplated in sub-section (1) thereof, and any lapse or delayed compliance thereof would be merely a procedural irregularity which would neither entitle the accused to be released on bail nor would vitiate the trial on that ground alone.

(v) Any procedural irregularity or illegality found to have been committed in



conducting the search and seizure during the course of investigation or thereafter, would by itself not make the entire evidence collected during the course of investigation, inadmissible. The Court would have to consider all the circumstances and find out whether any serious prejudice has been caused to the accused.

(vi) Any lapse or delay in compliance of Section 52A by itself would neither vitiate the trial nor would entitle the accused to be released on bail. The Court will have to consider other circumstances and the other primary evidence collected during the course of investigation, as also the statutory presumption permissible under Section 54 of the NDPS Act.”

4.i. Learned counsel further submitted that the arrest memo attached by the respondent bears the signature of the petitioner stating that he talked to his brother and informed him of his arrest on grounds of smuggling of heroin. Thus, the petitioner was aware of the grounds of his arrest. The counsel submitted that the ratio laid in ***Prabir Puryakasta (supra)*** was with reference to another set of facts wherein the arrest itself was challenged. However, in the instant case, the arrest is not challenged but rather the petition is moved for grant of bail. Hence the ratio will not be applicable.

4.ii. Learned counsel further submits with respect to quantity of contraband being divided among the accused, the counsel submitted that in the decision of ***Awdesh Yadav v. State Govt. Of NCT of Delhi, 2023 SCC OnLine Del 7732*** where the



Hon'ble Delhi High Court held that:

“25. The quantity of contraband recovered also assumes relevance at the stage of considering the bail application of the accused after Section 37 of the Act was also amended by the Amending Act of 2001. Section 37 of the Act, now, inter alia, provides that no person accused of an offence involving commercial quantity shall be released on bail unless the conditions laid down therein are satisfied.

In Amar Singh Ramji Bhai Barot vs. State of Gujarat: (2005) 7 SCC 550, the High Court had taken a view that since the appellant had also been convicted under 21(c) read with section 29 of the Act, for being in conspiracy with the co-accused, the total amount of prohibited substance recovered (personally from the appellant and also from the joint possession of two accused) were more than "commercial quantity", therefore, the appellant was liable to be visited with the minimum punishment of 10 years' rigorous imprisonment plus fine of Rs. 1 lakh...What follows from the observations of the Hon'ble Supreme Court is that where there is evidence to suggest the abetment/or criminal conspiracy, the quantity of contraband recovered individually could be combined for determining as to whether it is a "commercial quantity". 49. The following principles can be culled out governing clubbing of the quantity of contraband recovered from two or more co-accused, at the stage of bail:

i. invocation of offence of abatement and/or conspiracy under Section 29 of the Act is must for clubbing of quantity. However, there cannot be a straight jacket formula for clubbing the quantity of contraband recovered from all the accused, merely on the basis of invocation of offence under



Section 29 of the Act. It will depend on the factual backdrop of each case and the incriminating material available against the accused persons.

4.iii. Learned counsel next submits that where there is an allegation of conspiracy then the quantity of contraband cannot be divided on an individual basis as it would amount to joint recovery. The counsel also submits that the ***Kalu S.K., In re, (supra)*** would not apply on the respondent DRI, as the DRI was not a party in that case. He also submitted that the CDR report showed that 14 phone calls were made between the petitioner and the co-accused which corroborates that the petitioner was known to the co-accused and that he was actively involved in dealing with contraband's which has a deleterious effect on the youth of the country. The money generated through such illegal activities severely affects the economy of the State and the country which is further used in criminal activities and which overall impacts the national security and integrity of the country. He lastly submits that the petitioner has been apprehended along with other co-accused persons and caught red handed with commercial quantity of Heroin, and therefore, in view of the gravity of offence and in view of the operation of Section 37 of the NDPS Act read with Section 35 of the NDPS Act, he doesn't deserve the privilege of



bail.

5. On deeply studied and scrutinized all the materials on record and submissions of the both the parties, it is evident to note that this is the second bail application of the petitioner before this Court. As alleged by learned counsel for the petitioner that the petitioner was not informed of the grounds of arrest, however, as seen in the arrest memo dated 03.11.2023 marked as Annexure R/A, the petitioner has stated that he informed his brother about the arrest stating that he has been arrested on the grounds of smuggling of heroin. Further the Hon'ble Supreme Court in a recent judgment of *Narcotics Control Bureau v. Kashif*, 2024 SCC OnLine SC 3848 held that non-compliance with Section 52A of NDPS Act will not entitle the accused to bail. The Apex Court held:

“(iv) Sub-section (2) of Section 52A lays down the procedure as contemplated in sub-section (1) thereof, and any lapse or delayed compliance thereof would be merely a procedural irregularity which would neither entitle the accused to be released on bail nor would vitiate the trial on that ground alone.

(v) Any procedural irregularity or illegality found to have been committed in conducting the search and seizure during the course of investigation or thereafter, would by itself not make the entire evidence collected during the course of investigation, inadmissible. The Court would have to consider all the circumstances and find out



whether any serious prejudice has been caused to the accused.

(vi) Any lapse or delay in compliance of Section 52A by itself would neither vitiate the trial nor would entitle the accused to be released on bail. The Court will have to consider other circumstances and the other primary evidence collected during the course of investigation, as also the statutory presumption permissible under Section 54 of the NDPS Act.

6. Further, in ***Awadhesh Yadav v. State Govt. of NCT of Delhi (supra)*** where the Hon'ble Delhi High Court held that the quantity of contraband seized assumes relevance at the stage of considering the bail application of the accused under Section 37 of the Act. For the sake of convenience Section 37(1) is reproduced herein below:

“37. Offences to be cognizable and non bailable.-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity]2 shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not



guilty of such offence and that he is not likely to commit any offence while on bail.”

7. The Hon'ble Delhi High Court relied on the decision of the Apex Court laid in ***Amar Singh Ramji Bhai Barot v. State of Gujarat*** where it was held that where there is evidence to suggest the abatement/or criminal conspiracy, the quantity of contraband recovered individually could be combined for determining as to whether it is a 'commercial quantity'. The Hon'ble Delhi High Court laid down the following principles:

“iii. In a case where joint recovery of contraband has been effected from two or more co-accused, the recovered contraband cannot be equally divided amongst the number of accused to determine whether the quantity of contraband recovered in "commercial quantity" or not.

iv. where accused persons are traveling together in the same private vehicle individually carrying contraband, it will not be proper to consider the alleged recovery to be an individual recovery and the contraband recovered from all persons can be clubbed.”

8. In the instant case, the petitioner along with the three other co-accused were apprehended for smuggling of heroin from Assam to Hajipur and from perusal of CDR, 14 phone calls were made between the petitioner and the other co-accused on the date of occurrence. Further, there was recovery of contraband from all accused persons. Thus, there is ample



material on record to establish conspiracy between the petitioner and the co-accused as they were found to be in “joint possession” of 306.70 grams of contraband and have failed to give a legitimate justification for the possession of the same.

9. Considering the rival submissions, material on record and quantum of recovery being more than commercial quantity, this court having regard to the bar under Section 37 of the NDPS Act is not inclined to allow the petitioner, privilege of bail.

10. Accordingly, the prayer for bail of the petitioner is hereby rejected.

(Ramesh Chand Malviya, J)

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