2024:BHC-AS:3666

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.3784 OF 2023

Venktesh Shiva Permal ... Applicant
versus
The State of Maharashtra ... Respondent

Mr. Kamlesh Satre with Mr. Harshad Meshram, for Applicant.
Mr S.R.Aagarkar, APP for State.
Mr. Mahesh Shelar, PSI DCB CID Unit No.7 Ghatkopar Mumbai present.

CORAM: N.J.JAMADAR, J.

RESERVED ON : 18 JANUARY 2024
PRONOUNCED ON : 23 JANUARY 2024

JUDGMENT :

1. Heard the learned Counsel for the parties.

2. The applicant who is arraigned in C.R.No.9 of 2023 registered with DCB, CID, Unit No.7, Ghatkopar (Original C.R.No.6 of 2023 registered with Bhoiwada Police Station) for the offences punishable under Sections 20(b)(ii)(C) and Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act, 1985) has preferred this application to be enlarged on bail.

3. Pursuant to a secret intimation that four persons with described features and articles would come in front of Abstract Authentic Shop, Dadasaheb Phalke Road, Dadar on 1 February 2023 in between 3.30 a.m. to 4.30 a.m., the police party conducted a surveillance at the spot. At about 3.50 a.m., four persons matching the description and carrying the bags came thereat. They were accosted. After following

the mandate of the provisions contained in Section 50 of the Act, personal search of those persons was conducted. In a traveller bag which the applicant was carrying four packets were found. Those four packets contained ganja weighing 8 kg and 655 gms. Co-accused Sandeep was found in possession of 33 kgs and 608 gms ganja. Likewise, co-accused No.3 Surya Roy was found in possession of 20 kgs. 520 gms contraband and co-accused Mohammad was found in possession of 23 kgs and 600 gms of ganja. Thus, the aggregate of 66.455 gms of contraband article worth Rs.30,58,200/- was found in possession of the applicant and the co-accused who were moving together. Contraband articles were seized. Samples were collected. The accused came to be arrested. The inventory before the learned Magistrate was prepared in conformity with the provisions contained in Section 52-A of the Act.

4. Mr. Satre, learned Counsel for the applicant, strenuously submitted that there is a fundamental defect in the collection of the samples, which is evident from the FIR and the seizure panchanama which renders the prosecution case wholly unsustainable. The first information report and the panchanama clearly indicate that the contents of the four packets in which the contraband articles were allegedly found, were mixed, and, thereafter, samples were collected. Mixing of alleged contraband articles is in breach of the Standing Order and has been held to vitiate the seizure as it cannot be said to be a representative sample of the contents of each of the packets/containers.

5. Secondly, Mr. Satre would urge, there was an inordinate delay in compliance of the provisions contained in Section 52A of the Act, as the alleged seizure was effected on the night intervening 31 January 2023 and 1 February 2023 and the inventory was conducted on 10 February 2023. Therefore, the applicant deserves to be enlarged on bail.

6. On the first count, which was pressed into service by Mr. Satre pre-dominantly, it was urged that this Court has consistently held that mixing of the contents of different packets/containers and then collecting samples makes out a prima facie case for release of the accused on bail. Attention of the Court was invited to the order passed by this Court in the cases of **Parvez Haseen Khan V/s. The State of Maharashtra**[1] **Ibrahim Khwaja Miya Sayyed @ Raju V/s. The State of Maharashtra**[2] **Afsar Anwar Husain Sayyad V/s. The State of Maharashtra**[3] **Imran Mohamed Sharif Khan V/s. The State of Maharashtra**[4]and **Anand Laxman Tarde V/s. The State of Maharashtra**[5].

7. Reliance was also placed on the decision of the Supreme Court in the case of **Union of India V/s. Bal Mukund and Ors.**[6] wherein in the context of the Standing Instruction No.1/88, the Supreme Court noted that the Standing Instructions No.1/88 issued under the Act, 1985 lays down the procedure for taking

1 BA No.3486 of 2021 dt. 19 July 2023
2 BA 1296 of 2022 dt. 17 March 2023
3 BA 157 of 2023 dt. 29 Sept. 2023
4 BA 86 of 2023 dt. 31 August 2023
5 BA 3125 of 2023 dt. 8 December 2023
6 Cri. Appeal No.1397 of 2007 dt. 31 Mar 2009

samples. The High Court had noticed that samples of 25 gms each from all the five bags were taken, and, thereafter, mixed and sent to the laboratory. There was nothing to show that adequate quantity from each of the bags had been taken and that was the requirement in law.

8. On the aspect of non-compliance of the provisions contained in Section 52-A of the Act, the learned Counsel for the applicant placed reliance on the decision of the Delhi High Court in the case of **Kashif V/s. Narcotics Control Bureau**[7].

9. Mr. Aagarkar, learned APP resisted the application for bail. It was submitted that huge quantity of contraband articles were found in possession of the applicant and the co-accused. There was no infirmity in the search and seizure. Since the applicant and the co-accused were found in possession of the commercial quantity, the interdict contained in Section 37 of the Act, 1985 comes into play with full force. The applicant has not been able to show that the conditions stipulated under Section 37 for grant of bail have been fulfilled.

10. An endeavour was made by the learned APP to urge that the mixing of the contraband is not a grave irregularity as in the report of the Chemical Analyser, the substance recovered from the possession of the applicant and the co-accused has been found to be ganja. Whether any prejudice has been caused to the applicant on account of mixing of the contents of the packets is a matter for trial and cannot be considered

7 BA 253 of 2023 dt. 18 May 2023

at this stage.

11. I have carefully perused the report under Section 173 of the Code, the documents annexed with it, contents of the application and the affidavit in reply filed in opposition to the prayer for bail on behalf of the Respondent.

12. The thrust of the submission of Mr. Satre was that the seizure is vitiated as the contents of the four different packets allegedly found in possession of the applicant were mixed and, thereafter, the samples were collected. It would be necessary to note that this factual position is rather incontrovertible and is borne out by the FIR and the seizure panchanama. The impact of the mixture of the contents of each packets / containers and the collection of representative samples thereafter, on the entitlement for bail has been considered by this Court in the orders referred to above.

13. In the case of **Parvez Haseen Khan (supra)**, a learned Single Judge of this Court observed as under :

> "4. The Panchanama dated 25/11/2020 records that the investigating agency had mixed together the entire contraband contained in all the three bags and thereafter drawn three samples, one of which was forwarded to CFSL for analysis. The learned Single Judge of Delhi High Court in Amani Fidel Chris (supra) 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 cease to be a representative sample of the corresponding container/package". It is stated that decision in Amani Fidel Chris (supra) was challenged by NCB before the Apex Court and that the Special Leave Petition has been dismissed by the Hon'ble Supreme Court. Similar view is taken by this Court in Ibrahim Khwaja Miya Sayyed and Hari Mahadu Valse (supra) and by Telangana High Court in Baba Sow Chandekar (supra)."

14. In the case of **Ibrahim Khwaja Miya Sayyed @ Raju (supra),** this Court observed as under :

"11. 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 V/s. 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 cease 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 would be entitled for bail."

15. In the case of **Afsar Anwar Husain Sayyed (supra)**, noting the observations in the case of **Parvez Haseen Khan (supra),** this Court was persuaded to release the accused therein on bail as in that case as well, the entire ganja was mixed together and samples were thereafter drawn. A similar view was recorded in **Imran Mohamed Sharif Khan (supra)**. After noting the observations in the case of **Ibrahim Khwaja Miya Sayyed (supra)**, and the fact that two slabs allegedly containing charas were not kept separately, but together, and representative samples were drawn from those two slabs kept together, this Court granted bail to the accused therein.

16. In the case of **Laxman Thakur V/s. State (Got of NCT of Delhi)**[8] the Delhi High Court after referring to the decision in the case of **Union of India V/s. Bal Mukund and Ors. (supra)**, and noting the provisions of Standing Instruction No.1 of 1988 granted bail to the accused therein, wherein also ganja allegedly recovered from different packets from the possession of the accused therein was mixed and, thereafter, samples were taken.

17. I am mindful of the fact that this Court has consistently held in the orders noted above that mixing of the contents of the packets allegedly containing contraband articles and thereafter collecting samples is not in conformity with the

8 BA 3233 of 2022 dated 14 Dec. 2022

Standing Order and has exercised the discretion to grant bail. Yet, in my considered view, this aspect requires a little deeper scrutiny in the context of the judgments of the Supreme Court in case of **Bal Mukund (supra)** and **Sumit Tomar vs. State of Punjab**[9]**,** which has not been adverted to by this Court in any of the aforesaid orders.

18. To appreciate, the ratio of decision in **Bal Mukund (supra)**, on the strength of which the Delhi High Court has proceeded to hold that collection of the samples from the mixture is such infirmity as to entitle the accused to bail, it may be necessary to note the facts in **Bal Mukund (supra)** and the issues raised therein.

19. **Bal Mukund (supra)** was an appeal by the Union of India against an order of acquittal of the accused by the High Court reversing the order of conviction passed by the Special Court. In the said case, 10 kg of Opium was found in the possession of the Accused. The prosecution had primarily banked upon the confessional statement of the accused to bring home the charge. The learned Special Judge had based the conviction on the strength of confessional statement. The High Court had reversed the order of conviction on the ground that the confessions made by the accused were retracted and there was no corroboration by any independent witness. The confessions made by accused nos.1 and 2 were inadmissible against the accused no. 3. There was non-compliance of Section 42 of the Act, 1985. Lastly the sample of narcotics were not taken in terms of the Standing Instruction and in

9 (2013) 1 SCC 395

compliance with Section 55 of the Act, 1985.

20. In the aforesaid context, **Bal Mukund (supra)** primarily dealt with the admissibility and reliability of the confession. As an additional ground not to interfere with the order of acquittal, the Supreme Court referred to non-compliance of the Standing Instruction and observed, *inter alia,* as under:

> "39. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction 1/88, which had been issued under the Act, lays down the procedure for taking samples. The High Court has noticed that PW 7 had taken samples of 25 grams each from all the five bags and then mixed them and sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. It was a requirement in law."

21. It would be relevant to note that the Supreme Court had extracted, in paragraph No. 10, the relevant sub-clause (e) of clause 1.7 of the Standing Instruction No. 1/88. In the context of the controversy, it may be necessary to extract clause 1.7 under the caption "Number of samples to be drawn in each seizure case" under Standing Instructions No.1/88 issued by the Narcotic Control Bureau, New Delhi. It reads as under :

> "(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, indicat-

ing 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 of the 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."

(sub-clause (e) extracted by the Supreme Court in paragraph No.10 in Bal Mukund case)

22. It would be advantages to immediately notice the relevant provisions of the Standing Order No. 1/89 in Section–II General Procedure for Sampling, Storage etc. It 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 package/container in case of seizure of more than one package / container.

2.5 However, when the packages/container seized together are of identical size and weight, bearing identical markings, and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages

> are identical in all respects, the packages/containers may be carefully bunched in lots of ten 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.
> ……..
>
> 2.8. While drawing one sample (in duplicate) from a particular lot, it may be ensured that representative samples in equal quantity are 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.

23. Perusal of the aforesaid Standing Instruction No. 1/88 and Standing Order No. 1/89 would make it abundantly clear that in case of seizure of the single package/container, one sample in duplicate shall be drawn. It is further provided, normally it is advisable to draw one sample (in duplicate) from each package / container in case of seizure of more than one package / container. (sub-clause–a : Standing Instructions No. 1/88 and sub-Clause – 2.4: Standing Order No. 1/89). However, where a number of packages / containers are seized together, subject to the satisfaction that the packages are identical in all respect, packages / containers may be bunched in lots of specified packages/containers and for each lot of packages/containers one sample (in duplicate) may be drawn. The Standing Instruction, thus, also take care of the cases where a number of packages/containers are seized at the same time.

24. On a careful perusal of the decision in **Bal Mukund (supra)**, it becomes evident that **Bal Mukund (supra)** did not deal with the aspect of mixture of the contents and drawing of the samples from the said mixture, in the strict sense. On the

other hand, **Bal Mukund (supra)** adverted to sub-clause (e) of clause 1.7 of the Standing Instruction No. 1/88, which ordained that it should be ensured that representative drug in equal quantity is taken from each package/container and mixed together to make a composite whole from which the samples are drawn from that lot. **Bal Mukund (supra)** held that collection of 25 grams each from all the 5 bags did not amount to collection of adequate quantity from each of the bags. Therefore, the requirement of law in sub-clause (e) of the clause 1.7 of the Standing Instruction was not met. In **Bal Mukund (supra)** the emphasis was on inadequacy of the contents collected from each of the packages and not on the mixture of the contents and thereafter collection of the sample.

25. In contrast, the issue of mixing of the contents of various packages/containers and thereafter collection of sample was specifically raised in the case of **Sumit Tomar (supra).** A submission was canvassed before the Supreme Court that there was irregularity in mixing of contraband found in the bags and taking samples thereafter. The Supreme Court repelled the contention that police should have taken two samples each from two boxes without mixing, observing as under:

> 11. The next contention, according to the learned Senior Counsel for the appellant, is that the prosecution has committed an irregularity by mixing up the contraband found in the bags and taking samples thereafter. We find no substance in the said argument. The present appellant was driving the car in which two bags of contraband were loaded. He further pointed out that in view of Section 15(*c*) of the NDPS Act, which prescribes minimum sentence

> of 10 years and which may extend to 20 years where the contravention involves commercial quantity, the mixing of two bags is a grave irregularity which affects the interest of the appellant. We are unable to accept the said contention.
>
> 12. It is true that Section 15 of the NDPS Act speaks about punishment for contravention in relation to poppy straw. As per sub-section (*a*) where the contravention involves small quantity, the rigorous imprisonment may extend to six months or with fine which may extend to ten thousand rupees or with both whereas under sub-section (*b*) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, rigorous imprisonment may extend to 10 years and with fine which may extend to one lakh rupees. Sub-section (*c*) provides that where the contravention involves commercial quantity, the rigorous imprisonment shall not be less than 10 years but which may extend to 20 years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. Merely because different punishments have been prescribed depending on the quantity of contraband, we are satisfied that by mixing the said two bags, the same has not caused any prejudice to the appellant. Even after taking two samples of 250 gm each, the quantity measured comes to 69.50 kg which is more than commercial quantity (small quantity 1000 gm/ commercial quantity 50 kg and above). In view of the same, the contention that the police should have taken two samples each from the two bags without mixing is liable to be rejected.

26. The aforesaid judgment in case of **Sumit Tomar (supra)** has not been considered by this Court in the orders referred to above and relied upon by Mr. Satre. That, according to Mr. Satre, does not make any difference. Mr. Satre urged that the Delhi High Court in case of **Laxman Thakur (supra)** considered the submission on

behalf of the prosecution based on the judgment in the case of **Sumit Tomar (supra)** and yet after placing reliance on the decision of the Supreme Court in case of **Bal Mukund (supra)**, a three-judge bench judgment, did not accede to the submission on behalf of the prosecution that mixing of contents and thereafter collecting samples does not vitiate the seizure. In **Laxman Thakur (supra)** the Delhi High Court observed inter alia as under:

> 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.

27. I am unable to persuade myself to concur with the aforesaid reasoning of Delhi High Court in case of **Laxman Thakur (supra).** As noted above, **Bal Mukund (supra),** on which the Delhi High Court has placed reliance, dealt with a different fact situation. Clause 2.4 of the Standing Order No. 1/89 referred to in paragraph no. 10

of **Laxman Thakur (Supra)**, was not considered by the Supreme Court in case of **Bal Mukund (supra)**. On the contrary, the Supreme Court had considered sub-clause (e) of Clause 1.7 of the Standing Instruction No. 1/88 and it was on account of the inadequacy of the content of each of the bags the representative sample so collected was held to be in breach of the Standing Instruction.

28. What should be the approach of the Court ? There can be no duality of opinion about the proposition that having regard to the stringent provisions against grant of bail and the severity of the punishment which the offences under NDPS Act, 1985 entail, the Court must insist scrupulous compliance of the Standing Instruction/Order. However, the nature of infraction is required to be kept in view and also the element of prejudice likely to have caused to the accused. Undoubtedly the officers are instructed that one sample from each package/container in case of seizure of more than one package/container be collected. However, the directive is preceded by the word "normally" and it is "advisable" These words, ordinarily, cannot be construed as peremptory. Since the Standing Instruction/Order use the qualifying words like "normally" and "advisable", in my considered view, the correct approach would be to consider the impact of infraction of the directives as to the sampling alongwith other facts and circumstances of the case. Laying down a too broad proposition that the moment the investigating agency is found to have mixed the con-

tents of the containers and thereafter collected the sample, the entire seizure is vitiated would be taking an extreme view of the matter.

29. At the same time, the cases of non-compliance with the Standing Instructions/Order and search and sampling in flagrant violation of such Instructions, cannot be brushed aside as mere irregularities. There ought to be material to show that the Instructions have been substantially complied with.

30. The decision of the Supreme Court in the case of **Noor Aga V/s. State of Punjab and Anr.**[10] illuminates the path. In the said case, the Supreme Court considered the aspect of contravention of the Standing Order. Adverting to the earlier decisions in the case of **South Central Railway V/s. G. Ratnam**[11], and the clarification thereof by a subsequent decision in the case of **Moni Shankar V/s. Union of India**[12], the Supreme Court enunciated in clear and unambiguous terms that the guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-a-vis a departmental proceeding, rigours of such guidelines may be insisted upon.

31. The observations of the Supreme Court in paragraphs 87 to 91 are instructive and, hence, extracted below :

> "87. Preservance of original wrappers, thus, comes within the purview of the direction issued in terms of Section 3.1 of the Standing Order No. 1 of 1989. Contravention of such guidelines could not be said to be an error which

10 (2008) 16 SCC 417
11 (2007) 8 SCC 212
12 (2008) 3 SCC 484

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/s. G. Ratnam (supra) relating to disciplinary proceeding, 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."

88. In Moni Shankar V/s. Union of India (supra), however, this Court upon noticing G. Ratnam (supra), stated the law thus :

"15. It has been noticed in that judgments that Paras 704 and 705 cover the procedures and guidelines to be followed by the investigating officers, who are entrusted with the task of investigation of trap cases and departmental trap cases against the railway officials. This Court proceeded on the premise that the executive orders do not confer any legally enforceable rights on any persons and impose no legal obligation on the subordinate authorities for whose guidance they are issued.

16. We have, as noticed hereinbefore, proceeded on the assumption that the said paragraphs being executive instructions do not create any legal right but we intend to emphasise that total violation of the guidelines together with other factors could be taken into consideration for the purpose of arriving at a conclusion as to whether the department has been able to prove the charges against the delinquent official.

17. The departmental proceeding is a quasi judicial one. Although the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The Court exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the department, even if it is taken on its face

value to be correct in its entirety, meet the requirements of burden of proof, namely - preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality. (See State of U.P. V/s. Sheo Shankar Lal Srivastava – (2006) 3 SCC 276; Coimbatore District Central Coop Bank V/s. Employees Association – (2007) 4 SCC 669; and E. V/s. Secretry of State for the Home Deptt. - (2004) 2 WLR 1351 (CA).”

It was furthermore opined :

“23."It may be that the said instructions were for compliance of the Vigilance Department, but substantial compliance therewith was necessary, even if the same were not imperative in character. A departmental instruction cannot totally be ignored. The Tribunal was entitled to take the same into consideration along with other materials brought on record for the purpose of arriving at a decision as to whether normal rules of natural justice had been complied with or not."

89. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-`-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/s. Kurian Abraham (P) Ltd.[13] following the earlier decision of this Court in Union of India V/s. Azadi Bachao Andolan[14] 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

13 (2008) 3 SCC 582
14 (2004) 10 SCC 1

> substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution." (emphasis supplied)

32. The Court cannot loose sight of the fact that to arrive at the satisfaction that the Accused has not committed the offence, there must be a substantial probable cause. Whether the irregularity in collection of the sample vitiates the entire seizure would thus be a matter to be decided in each case in the light of the nature of infraction of the guidelines on the touchstone of substantial compliance thereof.

33. Reverting to the facts of the case, it is imperative to note that in the seizure panchanama, it is recorded that Police Sub-Inspector Dhotre had opened all four packets which were allegedly found in possession of the applicant. Contents appeared to be ganja. Thereupon, all the contents were mixed in a while nylon bag, weighed and, thereafter, samples were collected.

34. As noted above, sub-clause (b) and (e) of the Standing Instructions 1/88 and sub-clauses 2.5 and 2.8 of the Standing Order 1/89 envisage bunching of packets / containers in lots and thereafter, drawing of representative sample from each packet / container of that lot and mixing together to make a composite whole from which the samples are drawn for that lot. However, the principal condition is that the officer effecting the seizure must find that the packets/containers seized together are of

identical size and weight bearing identical marking and contents of each packet give identical results on colour test by drug identification kit, and, thus, conclusively indicate that the packages are identical in all respects.

35. Evidently, the underlying object of the Instructions is to ensure that the sample which is collected represents the bulk, unmistakably. Invariably, in pursuance of the provisions of the Act, and the Drug Disposal Rules, the bulk is disposed. When a person is sought to be fastened with liability for possessing a particular quantity of contraband, in bulk, on the basis of the sample collected, the Court ought to have the assurance that the sample so collected represented the entire bulk. The insistence on collecting samples from each of the packets and containers stems froms this objective.

36. In a situation of present nature, where the seizure panchanama does not indicate that the packets were identical and the contents were also identical and the officer effecting search had satisfied himself that the packets were identical in all respects, the mixing of the contents and thereafter collecting the samples from the said mixture, without anything more, erodes the sanctity of the samples so collected as representative samples of the bulk.

37. I am, therefore, impelled to hold that in the facts of the case, there has not been substantial compliance of the Standing Instructions 1/88 and Standing Order 1/89. Resultantly, the question as to whether the liability can be fastened on the

applicant for the possession of the contraband, prima facie, enters in the realm of uncertainty.

38. On the second ground Mr. Satre would urge that there is inordinate delay in dispatching the samples to the laboratory. Inviting attention of the Court to Clause 1.13 of the Standing Instruction No. 1/88 Mr. Satre urged that in the instant case there is a breach of mandate contained therein. Clause 1.13 reads as under:

> "13. Mode and Time for dispatch of sample to laboratory:
>
> The samples should be sent either by insured post or through special messenger duly authorized for the purpose. Dispatch of samples by registered post or ordinary mail should not be resorted to. Sample must be dispatched to the Laboratory within 72 hours of seizure to avoid any legal obligation."

39. In the case at hand, the contraband articles were seized on 31st January, 2023. Inventory was conducted before the learned Metropolitan Magistrate on 10th February, 2023 in accordance with the provisions contained in Section 52A of the Act, 1985. The samples were delivered at Forensic Science Laboratory, Kalina, Mumbai on 15th February, 2023. The chemical analysis report indicates that the samples were received on 15th February, 2023 and each of the samples was found to be 'Ganja'.If the aforesaid factor of delay in dispatch of the samples to the Forensic Science Laboratory is considered in conjunction with the non-compliance of the guidelines in the matter of collection of samples, which may vitiate the seizure, the first condition of Section 37

of the Act, 1985 can be said to have been met. The Court is not informed that there are antecedents which render it likely that the applicant would commit identical offences, if released on bail.

40. I am, therefore, inclined to exercise discretion in favour of the applicant.

41. Hence, the following order :

ORDER

(i) The Application stands allowed.

(ii) The Applicant – Venktesh Shiva Permal be released on bail in C.R.No.9 of 2023 registered with DCB, CID, Unit No.7, Ghatkopar (Original C.R.No.6 of 2023 registered with Bhoiwada Police Station) on furnishing a PR bond in the sum of Rs.50,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.

(iii) The applicant shall mark his presence before DCB, CID Unit No.7 Ghatkopar on first Monday of every month in between 11 am to 1 pm for a period of two years or till the conclusion of the trial.

(iv) The applicant shall not tamper with the prosecution evidence. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any police officer.

(v) On being released on bail, the applicant shall furnish his contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.

(vi) The applicant shall regularly attend the proceedings before the jurisdictional Court.

(vii) The applicant shall not indulge in identical activity for which he has been arraigned in this case.

(viii) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N.J.JAMADAR, J.)