



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

% Reserved on : 08th May, 2023
Pronounced on: 30th May, 2023

+ **CRL.M.(BAIL) 1324/2022 IN CRL.A. 338/2021**

MS. BETTY RAME Appellant

Through: Mr. Shiv Chopra, Ms. Aadhyaa Khanna, Mr. Siddharth Arora and Mr. Nikhil Srivastava, Advs.

versus

NARCOTICS CONTROL BUREAU Respondent

Through: Mr. Utkarsh Singh Bains, SPP with Mr. Sunil Kumar, Adv.

**CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL**

CRL.M.(BAIL) 1324/2022 IN CRL.A. 338/2021

1. This application has been filed seeking regular suspension of sentence in Crl. A. 338/2021 filed by the appellant assailing the judgment of conviction dated 25th August 2021 and order on sentence dated 28th August 2021 passed by the Ld. ASJ, Patiala House Courts in FIR No. VIII/09/DZU/2018 P.S. NCB. The appellant has been convicted and sentenced to RI for 10 years with a fine of Rs.1 lakh for the offence punishable under sections 22 (c) and 23 (c) NDPS Act. The appellant is a 38 years old lady who is a citizen of Zimbabwe and has already undergone 4 years, 11 months and 18 days in custody as per Nominal Roll dated 20th March, 2023.



2. Briefly, the prosecution case is that pursuant to secret information received on 2nd April, 2018 at about 7:30pm, one NCB team was constituted which apprehended one Zimbabwean lady on 2nd April, 2018 at about 8:30 pm at Terminal 1D, IGI Airport, New Delhi, who was going to board 9:40 pm IndiGo Flight No. 6E-505 inbound to Goa and on search of her baggage, two polyethene were recovered in each cavities containing crystalline substance. The colour, texture and property of material from both concealments were the same and each concealment was tested separately which gave positive results for Methamphetamine. After the testing, the contraband was mixed and transferred into a transparent polythene and the total weight was 3kg. Two samples of 5gm each were taken from the mixed substance, thereafter, the appellant's statement under section 67 NDPS Act was recorded. CRCL report dated 18th April, 2018 confirmed the crystalline substance to be Methamphetamine. A total of 12 witnesses were examined.

3. Learned counsel for the appellant has relied upon the following decisions of the Hon'ble Supreme Court and various other Courts where similarly placed convicts have been released on regular suspension of sentence despite having been accused of possessing a commercial quantity of the contraband, and they are follows:

- i) *Mossa Koya KP v. State (NCT of Delhi)*, 2021 SCC OnLine 3110;
- ii) *Daler Singh v. State of Punjab*, 2006 SCC OnLine P&H 15911;
- iii) *Joseph Onyekachukwu Nawabo v. Directorate of Revenue Intelligence*, CRL.A. 1175/2019 decided on 31st January, 2023 by this Court;



iv) *Chima Akuma v. State*, CRL.A. 1365/2019 decided on 31st January, 2023 by this Court;

4. Furthermore, the Hon'ble Supreme Court in *Sonadhar v. The State of Chhattisgarh*, SLP (Crl.) 529/2021 *vide* order dated 6th October, 2021 has laid down certain guidelines for the release of convicts who have already undergone about half of their sentence while their appeals are still pending adjudication.

5. In *Mossa Koya KP v. State (NCT of Delhi)* (*supra*) the Hon'ble Supreme Court granted suspension of sentence to an appellant who was sentenced to 10 years RI who was found in joint possession of 1kg heroin and had spent about 8 years in custody; in *Chima Akuma v. State* (*supra*) this Court had released an appellant on suspension of sentence who was in possession of commercial quantity of contraband and had undergone more than half of their sentence; in *Joseph Onyekachukwu Nawabo* (*supra*), an appellant who had undergone more than 7 years of custody (out of the total 10 years) for possessing a commercial quantity of the contraband, this Court had suspended the sentence of that appellant; in *Daler Singh v. State of Punjab* (*supra*) the Hon'ble High Court of Punjab & Haryana had laid down certain principles for release of convicts on bail *inter alia* those who were sentenced for 10 years for conscious possession of commercial quantity of contraband, should be entitled to bail if they have undergone a sentence of 4 years and that it must include at least 15 months undergone post conviction.

6. In *Joseph Onyekachukwa Nwayibo* (*supra*) this Court held as under:

“For the purpose of assessing a plea for suspension of sentence in an NDPS case, the following decisions are adverted to the Hon'ble Supreme Court in Moosa Koya KP v. State of (NCT of



Delhi), Cri. Appeal No. 1562/2021, dated 6th December 2021 that set aside a decision of the High Court that had declined grant of suspension of sentence where the appellant had already undergone a substantial period of sentence (8 years) out of the total 10 years awarded. The Hon'ble Supreme Court had noted that the appeal is unlikely to be heard early and given the pendency of the work it may not be feasible to expedite the disposal of the appeal within a short period. Accordingly, the sentence of the appellant in that matter was suspended.

Also in the following decisions of the Coordinate Benches of this Court, relying inter alia on the decision of **Daler Singh v. State of Punjab** (2006) SCC OnLine P&H 1591, this Court has granted suspension of sentence even in cases where the petitioner was a foreign national and had been convicted under the NDPS Act: **Chinazor Festus Mbalugh v. Narcotics Control Bureau**, Crl. Appeal No. 76 of 2020, decision dated 01st March, 2021; **Paul Chinedu Ugwar v. State (NCT of Delhi)**, Crl. Appeal No. 448/2015, decision dated 23rd February 2021; **Simon Onome Umukoro v. The State**, Cri. Appeal No. 754/2014, decision dated 4th February 2020; **Nisha @ Putalya v. State NCT of Delhi**, Crl. Appeal No. 110/2017, decision dated 2nd March 2020; **Mohd. Arif @ Guddu v. State NCT of Delhi**, Crl. Appeal No. 293/2017, decision dated 19th May 2020; **Chidiebere Kingsley Nawchara v. Narcotics Control Bureau** in Crl. Appeal No. 350/2020 decision dated 26th May, 2022.

It is noted from the Nominal Roll that the appellant has no prior convictions or previous involvements and his jail conduct has been satisfactory except for one incident. Even applying the principles in **Daler Singh** (*supra*), the appellant has undergone a period of more than 15 months after conviction and about 5 years and more in total of his sentence including the time as an under trial.”

7. In **Chima Akuma** (*supra*) this Court further noted as under:



“Learned counsel for the appellant also adverted to the observations by P. N. Bhagwati J. in Kashmira Singh v. State of Punjab (1977) 4 SCC 291 where the Hon’ble judge observed that “it would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him”

8. Besides the above, learned counsel for the appellant has contended that sample collection by the NCB was not as per the established standing order on the following grounds:

Firstly, the contraband was admittedly seized from two separate bags in two parts of the suitcase belonging to the appellant. The contents of the two bags were then mixed and samples were subsequently collected.

Secondly, field testing kit was allegedly used to determine the nature of the contraband, which as per the NCB, was methamphetamine and it was difficult to believe that the NCB was in possession of the test kit for this particular substance.

Thirdly, samples A1 and A2 were collected from the said mix and only A1 sampling was produced, while sample A2 was never produced before the Ld. Trial Court.

Fourthly, as per the Standing Order 1 of 89 dated 30th June, 1989, separate samples have to be collected from each bag seized and the contents of bags cannot be mixed since they would lose their identity. This aspect was also considered in detail in the decision of this Court in *Amani Fidel Chris* (supra) where, relying upon the said standing order, the court in a similar situation has held 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.

16. A combined reading of paras of the Standing Orders would show that where more than one container/package is found, the respondent is required to draw a sample from each of the individual container/package and test each of the sample with the ‘field testing kit’. It is further provided that if the container/packages are identical in shape, size and weight then lots of 10 or 40 containers/packages may be prepared and thereafter representative samples from each container/package in a particular lot are to be drawn, mixed and sent for testing.

17. 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.

18. In the present case, four packets containing suspicious powdery substance were found concealed in a ‘stroller bag’. On testing with the ‘field testing kit’, the powder in each packet tested positive for heroin. The I.O., without weighing the contents of each individual packet, mixed the powder from all the 4 packets in one polythene bag and then drew the sample from the mixture.

19. In the opinion of this court, the respondent ought to have adopted the procedure outlined in Para 2.4 of the Standing Order 1/89 [or para 1.7(a) of Standing Order 1/88] by drawing sample (in duplicate) from each of the 4 packets separately and then sending the samples for testing.”

It was also pointed out by the learned counsel for the appellant that the SLP before the Hon’ble Supreme Court against the said order was



dismissed and therefore, the decision of this Court in *Amani Fidel Chris* (*supra*) stood confirmed.

Fifthly, the impugned judgment in paras 27 and 28 while noting the contention of the appellant and the decision in *Amani Fidel Chris* (*supra*) does not apply that principle.

Sixthly, learned counsel for the appellant has also relied upon the decision of this Court in *Santine Simone v. Department of Customs*, 2020 SCC OnLine Del 2128 where the issue of 3 samples being drawn of 45 gm each placed in separate envelopes were concerned and this Court adverting to the Standing Order No.1/1989 noted that the instructions of the said Standing Order were not followed.

9. Learned counsel for the appellant has pointed out that the test memo is available in Trial Court Record for sample A1 however, the same is not available for sample A2.

10. Learned counsel for the NCB however contends that there was a report of the CRCL and which has been adverted to in the impugned order (in para 3 as well) that confirmed the presence of Methamphetamine. It was further contended that there was no requirement of section 50 NDPS Act to be complied with considering that the search was not made from the person of the appellant but from her suitcase. Further, as per the NCB once the contraband was confirmed as being Methamphetamine, the question of any separate samples being tested or not does not arise.

11. Having assessed the respective contention of the parties, this Court is of the view that the issue of improper sampling would have to be considered carefully at the time of adjudication of the appeal since *prima facie* it seems



from the record that the results of two samples drawn were not completely placed on record. Also, the fact that there was evidently a mix of both the packets which were seized, separate sampling as per the Standing Order was not done. However, these and other contentions would have to be considered at the stage of appeal, although provide sufficient ground for the appellant to be released on suspension of sentence having undergone more than half of sentence.

12. As regards the issue of sampling at the time of seizure, it may be worthwhile to deliberate upon the various authorities often cited in this regard. The issue that arises in this matter is of defect in the sampling procedure adopted by the investigating officer at the time when recovery and seizure, in this case, is effected. While the accused submit that the procedure for the sampling of seized materials is not in accordance with the mandate of the Standing Order No. 1/88 issued by the Narcotics Control Bureau and Standing Order 1/89 issued by the Ministry of Finance, Government of India, it is contended by the prosecution that these issues are a matter of trial as also that the Standing Orders are not mandatory but directory in nature. Yet another issue that arises is whether sampling ought to be done at the time of seizure or later in accordance with provisions of section 52A NDPS Act before the Magistrate. To fully unravel these contentions, it would be apposite to appreciate and assess the Standing Order being referred to, the context and purpose for which they were issued, and the decisions of various courts in this regard.

13. The manner of drawing a sample of narcotics has been laid down in Standing Order 1/88 dated 15.03.1988 issued by the Narcotics Control Bureau. Standing Order 1/89 dated 13.06.1989, is *pari materia* with



Standing Order 1/88, issued by the Department of Revenue, Ministry of Finance, Government of India.

14. The Hon'ble Supreme Court in *Noor Aga v. State of Punjab*, (2008) 16 SCC 417 dealing with recovery of 1.4kg heroin from a cardboard container, considering the sanctity of Standing Order 1/89, held as under:

“87. Perseverance 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 in a case of this nature can conveniently be overlooked by the Court. We are not oblivious of a decision of this Court in Chief Commercial Manager, South Central Railway, Secunderabad and Ors. v. G. Ratnam and Ors (2007) 8 SCC 212 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. Union of India and Anr. (2008) 3 SCC 484 , 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.

It was furthermore opined: (Moni Shankar case., SCC p. 493, para 23)

“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-a-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 and Ors. 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. 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 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 added)

15. The Hon'ble Supreme Court in ***Union of India v. Bal Mukund***, (2009) 12 SCC 161 while referring to Standing Order 1/88 held as follows:

“36. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction No. 1/88, which had been issued under the Act, lays down the procedure for taking samples. The High Court has noticed that PW7 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.”

(emphasis added)

16. Various decisions of this Court too have addressed this issue. In ***Basant Rai v. State***, 2012 SCC OnLine Del 3319 the accused was found carrying a polythene bag containing 8 smaller polythene bags having brown colour substance and the investigating officer took small pieces of charas from each packet, mixed the same and drew two sample parcels which were sent to FSL for analysis. While allowing the appeal of the accused, it was held as under:

“25. After hearing both the learned counsel for parties and going through the Trial Court Record, I find force in the submission of learned counsel for appellant. Admittedly, the



samples were drawn after breaking small pieces from 08 of the polythene bags which were allegedly kept in a green coloured bag by the appellant in his right hand. The 10 prepared two samples of 25 grams each after taking a small quantity from each of the slabs.

26. Though the settled law is that if it is not practicable to send the entire quantity then sufficient quantity by way of samples from each of the packets of pieces recovered should be sent for chemical examination. Otherwise, result thereon, may be doubted.'

27. For example, if the 08 packets were allegedly recovered from the appellant and only two packets were having contraband substance and rest 6 packets did not have any contraband; though all may be of the same colour, when we mix the substances of all 8 packets into one or two; then definitely, the result would be of the total quantity and not of the two pieces. Therefore, the process adopted by the prosecution creates suspicion. In such a situation, as per settled law, the benefit thereof should go in favour of the accused. It does not matter the quantity. Proper procedure has to be followed, without that the results would be negative."

(emphasis added)

17. In *Santini Simone v. Department of Customs*, 2020 SCC OnLine Del 2128 this Court acquitted the accused observing that the instructions contained in Standing Order No. 1/89 was not followed and it held as under:

"63. Concededly, in the present case the instructions contained in Standing Order No. 1/89, was not followed.

64. In Khet Singh v. Union of India: (2002) 4 SCC 380, the Supreme Court had, in the context of similar instructions issued (Standing Order 1/88) by the NCB, New Delhi, held that the same were to be followed by the Officer-in-charge of the investigation of crimes falling within the purview of the NDPS Act. The Court held that even though the said instructions did



not have the force of law, they were intended to guide the officers to ensure that a fair procedure is adopted in the investigation.

65. In a subsequent decision, in the case of State of Punjab v. Makhan Chand: (2004) 3 SCC 453, the Supreme Court held that Section 52A(1) of the NDPS Act did not empower the Central Government to lay down the procedure for search of an accused. But, a subsequent decision rendered by the Supreme Court on 31.03.2009, in Union of India v. Bal Mukund (supra), the Supreme Court observed that Standing Instructions No. 1/88, which required samples of adequate quantity be drawn, had not been followed and the same was referred to as “a requirement in law”.

66. The decision in the case of Bal Mukund (supra) which was rendered by a Bench of three Judges, is binding. It also cannot be disputed that even if the said instructions are not considered as binding, they lay down a procedure which the Investigation Officers are required to follow in the interest of ensuring that the samples drawn truly represent the composition of the substance recovered.

67. The entire purpose of drawing a sample and testing the same is to establish the composition of the substance from which the sample is drawn. Keeping this object in view, it must be ensured that the sample is a true representative of the substance recovered, before it can be assumed that the composition of the sample is the same as that of the recovered substances....

74. In view of the above, this Court is unable to accept that the prosecution has established that the contents of each of the four packets that were allegedly recovered, were tested and found to be charas prior to the contents of the said packets being placed together...

Since the prosecution has failed to establish that the sample drawn by PW-4, which was sent for chemical examination, is a true representative of the entire substance recovered, it has failed to establish that the substance allegedly recovered was charas. The appellant is, therefore, liable to be acquitted for the



offence for which he was charged and convicted by the Trial Court.”

(emphasis added)

18. Finally, in ***Amani Fidel Chris*** (*supra*) this Court also traversed the entire canvas, and acquitted the accused, observing as under:

“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.

*33. Resultantly, this court is of the view that the samples sent to the CRCL were not the representative samples. Besides, by mixing the contents of all the 4 packets before drawing any sample not only the sanctity of the case property in the individual packet was lost but also the evidence as to how much each individual packet weighed. In reaching the aforesaid conclusion, I also draw support from the decisions in *Shajahan v. Inspector of Excise (DB)* reported as 2019 SCC OnLine Ker 3685 *Kulwinder Kumar v. State of Punjab*, reported as 2018 SCC OnLine P&H 1754 and *Santosh Kumar v. The State of Bihar* passed in Criminal Appeal (SJ) No.158/2016 decided on 30.08.2019.”*

34. *(emphasis added)*

19. More recently, a Coordinate Bench of this Court in ***Laxman Thakur v. State (NCT of Delhi)***, 2022 SCC OnLine Del 4427 held as under:

“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.

(emphasis added)

20. On the issue of these Standing Order being not mandatory, as contended by the State, reference is sometimes made to ***Gurbax Singh v. State of Haryana***, (2001) 3 SCC 28 where the Supreme Court observed while acquitting the accused that Section 52 of NDPS Act is directory but held that the provisions cannot be ignored by the Investigating Officer, it was held as under:

9. ... In our view, there is much substance in this submission. It is true that provisions of Sections 52 and 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, IO cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. In the present case, IO has admitted that seal which was affixed on the muddamal article was handed over to the witness PW 1 and was kept with him for 10 days. He has also admitted that the muddamal parcels were not sealed by the officer in charge of the police station as required under Section 55 of the NDPS Act. The prosecution has not led any evidence whether the chemical analyser received the sample with proper intact seals. It creates a doubt whether the same sample were sent to the chemical analyser. Further, it is apparent that the IO has not followed the procedure prescribed under Section 57 of the NDPS Act of making full report of all particulars of arrest and seizure to his immediate superior officer. The conduct of panch witness is unusual as he offered himself to be a witness for search and seizure despite being not asked by the IO, particularly when he did not know that the substance was poppy husk, but came



to know about it only after being informed by the police. Further, it is the say of the Panch witness that muddamal seal used by the PSI was a wooden seal. As against this, it is the say of PW 2 SI/IO that it was a brass seal. On the basis of the aforesaid evidence and faulty investigation by the prosecution, in our view, it would not be safe to convict the appellants for a serious offence of possessing poppy husk.”

(emphasis added)

21. The apparent conflict in the manner of drawing a sample as provided in Section 52A(2)(c) of NDPS Act and the Standing Order 1/89 came to be considered by the Hon'ble Supreme Court in *Union of India v. Mohanlal*, (2016) 3 SCC 379 where it was held as under:

“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 added)

22. Reference must also be made to the decision of the Hon'ble Supreme Court in *State of Punjab v. Balbir Singh*, (1994) 3 SCC 299 where it held as under:

“24. Sections 52 and 57 come into operation after the arrest and seizure under the Act. Somewhat similar



provisions are also there in the CrPC. If there is any violation of these provisions, then the Court has to examine the effect of the same. In that context while determining whether the provisions of the Act to be followed after the arrest or search are directory or mandatory, it will have to be kept in mind that the provisions of a statute creating public duties are generally speaking directory. The provisions of these two sections contain certain procedural instructions for strict compliance by the officers. But if there is no strict compliance of any of these instructions that by itself cannot render the acts done by these officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate the trial or the conviction if otherwise there is sufficient material. Therefore it has to be shown that such non-compliance has caused prejudice and resulted in failure of justice. The officers, however, cannot totally ignore these provisions and if there is no proper explanation for non-compliance or where the officers totally ignore the provisions then that will definitely have an adverse effect on the prosecution case and the courts have to appreciate the evidence and the merits of the case bearing these aspects in view. However, a mere non-compliance or failure to strictly comply by itself will not vitiate the prosecution.

(emphasis added)

23. From a careful assessment of the decisions cited above and the perusal of the Standing Orders, this Court is of the considered opinion that the Standing Orders have to serve a certain purpose having been issued by the Narcotics Control Bureau, Government of India and cannot be rendered optional for compliance to the investigating agencies. The procedures prescribed in the said orders are based upon a certain logic which ought to be respected, or else it would be a worthless piece of paper. Notwithstanding



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

24. As a side-wind, it is worth mentioning that post the decision in *Mohanlal (supra)*, the discussion has also veered towards whether the sampling has to be done mandatorily before the Magistrate in compliance of Section 52A NDPS Act. Recently, a Coordinate Bench of this Court in *Kashif v. Narcotics Control Bureau*, 2023 SCC OnLine Del 2881 while granting relief to the accused has taken the view that the compliance of Section 52A is mandatory and cannot be delayed or ignored. Moreover, there is a recent Standing Order issued dated 23rd December 2022 by the Ministry of Finance in exercise of powers conferred by Section 76 r/w Section 52 A of NDPS Act wherein procedure for seizure and storage of seized material and sampling and disposal has been provided in detail and



which directs sampling to be done in front of the magistrate. Therefore, as per this view, the sampling ought to be done in compliance of Section 52A and not at the time of seizure. However, this has not been the scope of the discussion during the arguments addressed by the learned counsels in this matter and therefore is not being deliberated in detail. The only purpose why this is being adverted to, is to emphasize that in this case the samples were drawn at the time of seizure and that too not in compliance with the Standing Orders.

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

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



27. In this case, besides the fact that the appellant may have a case to argue on the issue of defective sampling at the time of seizure, the appellant has also undergone a substantial period of sentence and the appeal is likely to take some time for hearing. In view of the directions of the Hon'ble Supreme Court in *Sonadhar v. The State of Chhattisgarh*, SLP (Crl.) 529/2021 *vide* order dated 6th October, 2021, as well as *Saudan Singh v. State of Uttar Pradesh*, 2021 SCC OnLine SC 3259 (where the Hon'ble Supreme Court has stated that in cases other than life sentence cases the broad parameter of 50 per cent of the actual sentence undergone can be the basis for grant of bail), this Court deems it fit to suspend the sentence of the appellant. It is therefore directed that the sentence of the appellant be suspended pending the hearing of the appeal, on furnishing a personal bond in the sum of ₹1,00,000/- with one surety bond of the like amount, subject to the satisfaction of the learned Trial Court/ CMM/ Duty Magistrate, further subject to the following conditions:

- i) Appellant will not leave the country without prior permission of the Court. Appellant will deposit the copy of her passport to the Ld. Trial Court.
- ii) Appellant shall provide permanent address to the Ld. Trial Court. The appellant shall intimate the Court by way of an affidavit and to the IO regarding any change in residential address.
- iii) Appellant shall appear before the Court as and when the matter is taken up for hearing.
- iv) Appellant shall provide all mobile numbers to the IO concerned which shall be kept in working condition at all times and shall not



switch off or change the mobile number without prior intimation to the IO concerned. The mobile location be kept on at all times.

- v) Appellant shall not indulge in any criminal activity and shall not communicate with or come in contact with the prosecution witnesses or tamper with the evidence of the case.
- vi) Appellant shall report to the IO on every first and third Monday of the month at 4 p.m. and she shall not be kept waiting for more than an hour.

28. Needless to state, any observation touching the merits of the case is purely for the purposes of deciding the question of suspension of sentence and shall not be construed as an expression on merits of the matter.

29. Copy of the order be sent to the Jail Superintendent for information and necessary compliance.

30. Accordingly, the application is disposed of.

31. Order be uploaded on the website of this Court.

(ANISH DAYAL)
JUDGE

MAY 30, 2023/sm