HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

S.B. Criminal Miscellaneous 2nd Bail Application No. 5457/2024

Major Singh S/o Shri Jogendra Singh, Aged About 22 Years, R/o Lamochar Kalan, Police Station Jalalabad Sadar, District Firojpur (Punjab) (At Present Lodged In Sub Jail Anoopgarh)

----Petitioner

Versus

State Of Rajasthan, Through Pp

----Respondent

For Petitioner(s)	:	Mr. Anand Purohit, Sr. Advocate assisted by Mr. D.S. Thind
For Respondent(s)	:	Mr. Javed Gauri, PP

HON'BLE MR. JUSTICE FARJAND ALI

Order

08/05/2024

1. The jurisdiction of this court has been invoked by way of filing the second bail application under Section 439 CrPC at the instance of accused-petitioner. The requisite details of the matter are tabulated herein below:

S.No.	Particulars of the Case	
1.	FIR Number	144/2022
2.	Concerned Police Station	Ramsinghpur
3.	District	Ganganagar
4.	Offences alleged in the FIR	Sections 307, 332, 279, 337, 353 of the IPC and Section 8/15 of the NDPS Act
5.	Offences added, if any	-
6.	Date of passing of impugned order	24.04.2024

2. The first bail application of the petitioner being SBCRLMB No.757/2024 came to be dismissed by this Court vide order dated

14.02.2024 but a liberty was granted to the petitioner to renew his prayer for bail after recording the statement of the Seizing Officer. Now, the statement of the Seizing Officer has been recorded. Hence the instant bail application.

3. It is contended on behalf of the accused-petitioner that no case for the alleged offences is made out against him and his incarceration is not warranted. There are no factors at play in the case at hand that may work against grant of bail to the accused-petitioner and he has been made an accused based on conjectures and surmises. He further submits that the accused was taken into custody on 08.06.2022 and since then he is behind the bars. Now, around two years have lapsed but the trial is not going to be culminated and still it seems that a further long time shall be taken in conclusion of the same, thus, he may be enlarged on bail.

4. Contrary to the submissions of learned counsel for the petitioner, learned Public Prosecutor opposes the bail application and submits that the present case is not fit for enlargement of accused on bail.

5. Have heard and considered the submissions made by both the parties and have perused the challan papers, the statements of independent witnesses and the other material available on record.

6. What is reflecting from the record that a vehicle was intercepted by the police on 08.06.2022 near Kumpli circle in which certain quantity of contraband was recovered and, therefore, the petitioner and the other person were apprehended at the spot and after usual investigation, charge sheet came to be

submitted against them for the above mentioned offences and the trial commenced.

7. A perusal of the statements of independent witnesses reflects that P.W. 1 Ajay Kumar, who happens to be a witness and was projected by the prosecution to verify the recovery from the vehicle but he did not support the story set out by the prosecution and turned hostile.

8. P.W.2 Balvindra Singh is also an independent witness, who was working in his agricultural field situated near crime spot and present at the time of incident. In his on oath statement, he denied from the fact of recovery of contraband.

9. P.W. 3 Deepak was also projected as an independent witness who was present at the crime place; but he turned hostile and didn't support the story of prosecution.

10. Similar is the statement of P.W. 4 Balveer Singh @ Billa and P.W. 5 Baldev Singh as both have totally denied regarding the fact of recovery of the contraband from the vehicle and did not support the story of the prosecution. P.W. 6 & P.W. 7 Sukhpal Singh and Gurmeet Singh also made the similar recital.

11. All the seven independent witnesses have blatantly denied to give their support to the fact of recovery of contraband made by the police.

12. The Seizing Officer Daula Ram has been examined as P.W. 8. Although, in his examination-in-chief, he narrated the story in the manner in which the incident is shown to have occurred but when he was tested in cross examination, he candidly admitted that the

entire memos, seizure, notices, arrest, search and recovery memos were prepared in the police station premises.

13. The admission made by the above witnesses has put a serious dent on the story of the prosecution to the effect that a vehicle was intercepted by the police at a particular place and time and certain quantity of contraband got recovered from it. In order to sanctify the search and seizure of contraband, it was expected from the Seizure Officer to prepare the memos at the crime place that too in the presence of the independent witnesses if available nearby the place. Present is a case where several persons were available at or nearby the crime place but not a single independent witnesses has corroborated the factum of recovery memo. Taking of the vehicle and the accused from the crime scene to the police station and then preparation of memos within the close precinct of the police station, as per their convenience has lost the sanctity of the search and seizure. Law requires that if certain thing is recovered at a particular place on the given time then the memos should be prepared at the same place in the presence of witnesses and accused. Although, it is a prima face and tentative opinion of this Court only for the purpose of justifiable disposal of the bail application.

14. Discussing the above circumstance, this Court has taken a view in SBCRLMB No.11544/2023 titled as Kamlesh Kumar Vs. Union of India decided on 30.10.2023. The relevant part is reproduced as under:-

> *5. Have considered the submissions made by both the parties and have perused the material available on record. The*

circumstances created by the Police team in this matter brings the recovery into doubt. The statement of the seizing officer recorded under Section 164 of Cr.P.C. reveals that the process of seizure was conducted at the Office of Superintendent CBN, Neemach instead of the place where the recovery took place and the same is corroborated by the Panchnama Japti. He submits that the sanctity of the seizure made in the premises of Police Station is highly doubtful and no explanation furnished by the team members as to why the search and seizure was not made at the place where the vehicle was intercepted. It is not comprehensible as to what was the need to conduct the seizure at a place located 20-25 kms away from the place where the vehicle was intercepted; that too, at the premises of Office of Superintendent CBN, Neemach and no reasonable explanation has been furnished for the same. When the actual recovery had already been made and search and seizure had already been conducted at the shop and warehouse of the petitioner beforehand, then why was the memo regarding the same prepared after a significant period of time had passed at another place (CBN, Neemach) making it seem as if seizure/recovery memo can be prepared as a paper formality whenever it is convenient when the actual, physical recovery had been made at a different place, thus, watering down the sanctity of seizure/recovery memo.

15. The credibility of the seizure memo looses significance if the thing is recovered at a distant place and it is taken by the police from the crime scene to the police station and then memos got prepared in the police station. If it is allowed then why not in every case the things may be taken from the crime scene and wherefter, the entire proceeding be undertaken in the premises of police station and then why not in every case the accused can be detained from any place and whereafter his/her/their memo of arrest be prepared in the police station. This Court is of the view that if anything or any incriminating material is collected or

recovered from a particular place and at a particular time then the seizure memo/recovery memo should have been prepared at the same place and that too in the presence of the witnesses of the same locality. A slight departure or deviation can be permitted in case when no other person is available to verify the fact of recovery at the crime scene then the members of the police party can be made witness of the fact of recovery. In certain circumstances, when there is heavy rain or there is heavy traffic on the highway or other like situation, in that cases also, the seizure memo can be prepared at a nearby place so that the proceedings can be undertaken calmly or safely. However, it is not permissible for a police officer to pick the contraband from a particular place then carry with him to the police station which is situated at a far place and whereafter prepare the seizure memo in the police station premises. The moment this kind of practice is permitted; the day is not far when there would be a trait that the police officers will claim that though the memos were prepared in the police station but the things were recovered from a different place. In that situation, the purity, originality, genuineness and virtuousness would be lost and at the same time, there would be serious aspersions regarding fairness and genuineness of factum of seizure.

16. Besides the above, it is revealing that P.W. 8 Daula Ram, Seizing Officer took samples from the spot, marked as ‘A’ to ‘M’ and sent the same to the FSL for its chemical examination wherein presence of *phenanthrene alkaloids namely morhphine* was observed. Thus, the samples taken at the spot were sent to the

FSL which is against the mandate of law because the same were not taken in the presence of a Magistrate. As per Section 52-A of the NDPS Act, and Standing Order No.1/89, issued by the Government, it was imperative upon the police officer to prepare an inventory and take samples in the presence of a Magistrate and then send the same to chemical examiner, so as to sanctify the process of seizure and presence of contraband in possession of the accused. Having not done so, the Investigating Agency has committed a grave error and as such, the FSL report would not help the case of the prosecution. In this view of the matter it can be said that the samples sent to the FSL and the report of the FSL in this regard is nothing but is a waste paper as propounded in a judgment titled as ***Mohammed Khalid and another Vs. The State of Telangana*** passed by Hon'ble the Supreme Court in Criminal Appeal No(S). 1610 Of 2023 dated 01.03.2024, it was held that since no proceedings were undertaken for preparing of inventory and drawings of samples as per Section 52-A of NDPS Act, thus, the FSL was considered to be waste and was not considered worthy of being read in evidence on the basis of this inter alia other aspects, Hon'ble the Apex Court acquitted the appellants of all charges. The relevant paragraph of the above judgment is reproduced as under:-

> *"22. Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report(Exhibit P11) is nothing but a waste paper and cannot be read in evidence."*

17. At the stage of hearing of a bail plea pending trial, although this Court is not supposed to make any definite opinion or observation with regard to the discrepancy and legal defect appearing in the case of prosecution as the same may put a serious dent on the State's case yet at the same time, this Court can not shut its eye towards the non-compliance of the mandatory provision, around two years of incarceration pending trial, failure of compliance with the procedure of sampling and seizure and the serious issue of competence of seizure officer. In the case of ***Mohd. Muslim @ Hussain Vs. State (NCT of Delhi)*** passed by Hon'ble the Supreme Court in Special Leave Petition (Crl.) No.915 of 2023 vide order dated 28.03.2023, it has been propounded that at the stage of hearing a bail application under Section 439 Cr.P.C., although it is not possible to make a definite opinion that he is not guilty of the alleged crime but for the limited purpose for the justifiable disposal of the bail application, a tentative opinion can be formed that the material brought on record is not sufficient enough to attract the embargo contained under Section 37 of the NDPS Act. Though specific arguments have not been conveyed but looking to the fact that the accused is in custody, this court feels that the accused is not supposed to establish a case in support of his innocence rather his detention is required to be justified at the instance of the prosecution, therefore, this court went deep into the facts of the case and the manner in which the entire proceedings have been undertaken. If other surrounding factors align in consonance with the statutory stipulations, the personal liberty of an individual can

not encroached upon by keeping him behind the bars for an indefinite period of time pending trial. In view of the above, it is deemed suitable to grant the benefit of bail to the petitioner.

18. Accordingly, the instant second bail application under Section 439 Cr.P.C. is allowed and it is ordered that the accused-petitioner as named in the cause title shall be enlarged on bail provided he furnishes a personal bond in the sum of Rs.50,000/- with two sureties of Rs.25,000/- each to the satisfaction of the learned trial Judge for his appearance before the court concerned on all the dates of hearing as and when called upon to do so.

(FARJAND ALI),J

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