

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE SIDE

CRIMINAL BAIL APPLICATION NO.193 OF 2016

Hyacinth Ocianik Uzoigwe ... **Applicant**

V/s.

The State of Maharashtra ... **Respondent**

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Mr.Dilip Mishra i/b Ayaz Khan, Advocate for the Applicant.

Mrs.A.S.Pai, APP for the Respondent/State.

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CORAM : P. N. DESHMUKH J.

DATED : 28th JULY 2016.

P.C:-

1 This is an application for bail by accused who is involved in Crime No.70 of 2015 registered with Anti Narcotics Cell, Kandivli Unit, Mumbai dated 30th January 2015 for the offence punishable under section 8(c) read with Section 21 of The Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985.

2 Heard learned counsel for both the sides.

3 It is submitted on behalf of applicant that though applicant is involved in a case involving commercial quantity of *cocaine* weighing

221 gms alleged to be recovered during the personal search of accused from the pair of chappals carried by him. There is non compliance of mandatory provisions of Section 50(1) of the said Act, as in the entire charge-sheet, there is no evidence establishing compliance of said mandatory provisions. It is further contended that even there is non compliance of Section 57 of the NDPS Act and by pointing to the relevant provisions of search and seizure panchnama of contraband along with the C.A. Reports, it is submitted that even case of prosecution of drawing of samples and forwarding it for its analysis to C.A, is doubtful as it cannot be said that the samples drawn out of contraband seized, were the same which were forwarded for its analysis. For this purpose, learned counsel for the applicant has also referred to relevant statement of carrier along with requisition letter to the Stores in-charge for handing over sample packets to the carrier.

4 In the light of above submissions and on relying upon the case of **State of Rajasthan Vs. Parmanand & Anr reported in (2014) 5 SCC 345**, it is submitted that applicant is entitled for grant of bail.

Learned counsel for the applicant has also relied upon order of co-ordinate Bench of this Court in Criminal Bail Application No.842 of 2013 with Criminal Bail Application No.914 of 2013

involving two foreign nationals having found in their possession commercial quantity of *cocaine* and were released on bail, pending trial, for non-compliance of mandatory provisions of section 42 (50) of NDPS Act, and has thus prayed that application be allowed.

5 At the outset, learned APP opposed the application contending that since contraband *cocaine* involved in the crime is weighing 221 gms, and is of commercial quantity, application is liable to be rejected in view of bar of section 37 of NDPS Act, and has further submitted that there is sufficient compliance of Section 50(1) of the Act as from the documents filed with the charge-sheet, it is established that applicant was apprised of his right of search, even in writing, to which he declined and was then searched by the members of the raiding team.

6 It is further contended that there is no substance in the case of applicant with reference to forwarding samples to C.A, as aforesaid, as from the forwarding letter to C.A, it is clearly established that samples of "A1" and "B1" were forwarded for its analysis, and has further contended that applicant since is a Nigerian National and continued to stay in India inspite of expiry. of his visa, much earlier to his date of arrest, his conduct also speaks in volumes, and thus prayed

for rejection of application. Learned APP in support of her submission relied on the case of *Superintendent, Narcotics Control Bureau vs. R. Paulsamy reported in (2000) 9 SCC 549*, and has contended that for non-compliance of mandatory provisions, pending trial, no Bail Application can be considered in favour of applicant.

7 In the light of submissions advanced, as aforesaid, I have perused documents filed with the application where-from it appears that there is sufficient compliance of Section 42(2) of NDPS Act which aspect is even otherwise not disputed. It appears that based on information received by police, trap came to be laid on 30th January 2015 at Sahar Cargo Road, Sahar, Andheri (East) Mumbai, where at around 3.30 p.m, applicant arrived carrying one white colour plastic bag and was apprehended. Applicant was then apprised of provisions of Section 50 of NDPS Act and was subjected to search when the carry bag was found containing a pair of chappals containing 150 gms and 140 gms each of powder which, on testing on Field Test Kit, tested positive for cocaine. Two samples each were drawn from the seized quantity of cocaine, and were marked as "A1", "A2" and "B1" and "B2", respectively, and all the muddemal articles were seized under panchnama along with bulk quantity of cocaine marked as 'A' and 'B'.

Out of the seized samples, “A1” and “B1” were forwarded for its analysis to C.A.

8 With reference to the submissions on behalf of applicant about compliance of mandatory provision of Section 50(1) of the Act, on perusal of seizure panchnama, it reveals that what is apprised to accused before his search was obtained, is that he was informed that as per information received, he was possessing contraband drugs and if so required, his search will be conducted in the presence of nearest Officer of Magistrate, upon which the applicant declined for the same orally in English. From the contents of seizure panchnama as aforesaid, there is nothing to establish that before applicant was subjected to search, he was informed of his right to search in the presence of nearest Gazetted Officer or Magistrate.

9 Though according to learned APP, applicant was apprised of said right in writing, on perusal of writing on record, it reveals that applicant was informed that there is reason to believe that he is possessing narcotics drugs, and therefore, his personal search was required to be obtained and if he so required, such search will be conducted in presence of nearest Gazetted Officer or Magistrate. Even

on considering contents of this writing, it cannot be said that applicant was apprised of right of his search as contemplated under section 50(1) of the NDPS Act.

10 In that view of the matter, *prima facie* it is found that there is non-compliance of mandatory provisions of section 50 of the Act. In the circumstances, law as laid down by the Honourable Apex Court and relied on behalf of the applicant, in the case of ***Parmanand & Anr*** (supra) can be directly applied wherein in paragraph no.19 of the judgment it is specifically observed that before accused is subjected to search, he should be informed of his right to be searched before the nearest Gazetted Officer or before the nearest Magistrate. Considering the facts, as aforesaid, it is found that applicant is not apprised of his right, as aforesaid.

11 On considering further case of applicant with reference to samples drawn and forwarded to C.A, on perusal of seizure panchnama, it appears that from the recovered quantity of contraband cocaine weighing 152 grams and 248 grams respectively from each of the chappals, two samples each were drawn from said bulk quantity of cocaine, and were marked as “A1”, “A2” and “B1” “B2”. It is the case of

prosecution that out of these samples, A1 and B1 were forwarded for its analysis. However, on perusal of C.A report, it reveals that the description of articles stated to be received by C.A is Article marked as “A1 and “B1”. On this aspect, on considering statement of carrier – Narayan Dhumal Head Constable, buckle No. 21086, he, on 31st January 2015 on the strength of requisition memo to the stores by Investigating Officer had collected sample packet “A1”. In the light of his statement, on perusal of requisition memo to Stores in-charge, it is found that as per this requisition, Investigating Officer has requested to hand over sample packet “A1” in the custody of Head Constable 21086 for depositing it with the C.A. It, therefore, appears that only one sample packet “A1” was collected by carrier as per requisition memo to Stores In-charge, and deposited with C.A. Moreover, though according to the seizure panchnama, two samples each weighing 2 grams each were drawn from the bulk quantity, the weight of articles forwarded to C.A does not tally with the same, as it appears to be lesser than 2 grams. This aspect also raises sufficient doubt in the case of prosecution.

12 Similarly, on the account of compliance of Section 57 though learned counsel for the applicant has by referring the Special

report has submitted that there is non-compliance of said provision as the special report is sent on 15th December 2014 inspite of arrest of applicant effected on 31st January 2015, however, I find substance in the case of prosecution that in the special report dated 31st January 2015, erroneously date is mentioned as “15th December 2014” on which date sample packets are stated to be forwarded to C.A, as according to the requisition letter to C.A, the samples are found forwarded on 31st January 2015. Even otherwise said date as 15/12/2014 does not have any significance in view of the fact that incident in question is dated 30/01/2015.

13 Having considering facts as aforesaid, though according to the bar of Section 37 of the Act, no accused can be released on bail when the application is opposed by learned APP, unless 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 such offence while on bail. From the above discussed facts, it cannot be said that there are reasonable grounds for believing that accused is guilty of offence as from the facts as aforesaid, case of prosecution raises serious doubts and possibility of false implication of accused, thus, cannot be ruled out.

14 Though learned APP for alleged non-compliance of Section 50 of the NDPS Act involved in this case, has relied upon the case of *Superintendent, NCB Vs. R. Paulsamy* (supra) contending that said aspect can be considered at the time of trial, and as such, cannot be pre-judged at the bail stage, the provisions involved in that case were under section 52 and 57 of the Act which are directory in nature, unlike Sections 42, 50 involved in this case which are admittedly, mandatory in nature, and as such, for non-compliance of mandatory provisions of Section 50 of the Act, applicant is found to be entitled for bail, though he is a Foreign National by imposing suitable conditions as per order below.

ORDER

Applicant is ordered to be released on bail on his furnishing P.R.bond in the sum of Rs.1,00,000/- (Rupees One lakh) with one surety in like amount.

While on bail applicant shall mark his presence with Anti Narcotics Cell thrice a week i.e. Monday, Wednesday and Saturday between 1.00 p.m to 2.00 p.m except on the dates on which he is required to attend before the Special Court during the pendency of trial and shall not tamper with the investigation.

(P. N. DESHMUKH J.)