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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

BAIL APPLICATION NO. 1051 OF 2016

Miss. Henna Bharat Shah. ... Applicant.

V/s.

State of Maharashtra
(at the instance of Varkak
Nagar Police Station, Thane) Respondent.

and

BAIL APPLICATION NO. 1049 OF 2016

Shahid Farid Choudhary. ... Applicant.

V/s.

State of Maharashtra
at the instance of Varkak
Nagar Police Station, Thane). ... Respondent.

Mr. Ayaz Khan a/w. Mr. S.S. Bhandary for the Applicant in BA 1051/16.

Mr. Taraq Sayed for the Applicant in BA 1049/16.

Mrs. Jyoti S. Lohokare, APP for the State.

CORAM : A.S. GADKARI, J.

DATE : 24 April, 2017.

P.C. :-

These are applications under Section 439 of the Code of

Criminal Procedure for bail in CR No.II-3093/2015 dated 29th July 2015 registered with Vartak Nagar Police Station, Thane under Sections 22, 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

2. It is the prosecution case that on receipt of specific confidential information on 28.07.2015, the police attached to Anti Narcotic Cell, Thane City laid a trap on the service road opposite Viviana Mall, Thane (West). On 29.08.2015 at about 12.15 a.m. (00.15 a.m. of 30.07.2015). The police accosted the applicants and took their search. That the applicant Henna Shah was found in possession of 430 grams and the applicant Shahid Farid Choudhary was found in possession of 100 grams mephedrone powder on their person. The police thereafter complied with the necessary formalities as required under the law. During the course of investigation the applicants came to be arrested on 29th July 2015 and after completion of investigation, the police have submitted charge-sheet.

3. It is submitted that there is a violation of Section 50(4) of the NDPS Act as the applicant Henna Shah was searched within the gaze of males. It is further submitted that as far as

the applicant Shahid Choudhary is concerned, his search was taken in contravention of Section 42 of NDPS Act read with the notification issued by the Home Department, Government of Maharashtra dated 14th November 1985. The first informant viz. Miss. Anusaya Dhone and witness viz. Mahadeo Chabukswar in their statements have stated that under the directions of Police sub-Inspector, Mr. Walzade, lady police constable Smt. Chopade, in the presence of lady panch witnesses took the personal search of applicant Henna Shah. The Division Bench of this Court in the case of *Mrs. Veenela Tilak v/s. Shri Shahasane Asstt. Collector of Customs and Anr.*, reported in 1997 All MR (Cri) 368 in paragraphs 15,16 and 18 has held as under :-

“15. Now, if a woman accused has to be search, merely calling a female officer to search her will not fulfill the legislative intent. The legislative intent appears to be to protect the lady accused's modesty while conducting her search. The search has to be conducted by having strict regard for decency. Therefore, the officers will necessarily have to secure the presence of lady panchas. If the search is carried out in the presence of male panchas, the very purpose of sub-section (4) of Section 50 of the NDPS Act and such similar provisions contained in other statutes would be frustrated. What is sought to be achieved by sub-section (4) of Section 50 of the NDPS Act, the relevant provisions of Criminal

Procedure Code quoted hereinabove and similar provisions of the Customs Act and the FERA would be lost if the investigating agency does not carry out the search by a female in the presence of female panchas.

16. In this regard reference may be made to the decision of the Supreme Court in AIR 1962 1989 where the Supreme Court had an occasion to comment on a search of a woman carried out in the presence of men. The Appellant in that case was tried for an offence under the Suppression of Immoral Traffic in Women and Girls Act. The charge against the Appellant was that she supplied a girl to one Manmohan Mehta, who is a witness and she kept or managed a brothel. The prosecution story was that after the information was received, a trap was laid and two persons were sent to the Appellant to ask for a girl for the purpose of prostitution. One of them was to be a panch, a witness to the fact that the appellant supplied female for prostitution. Two one-hundred rupee marked currency notes were given to Mehta with instruction that he was to pay out of that to the appellant. He accordingly paid the amount quoted by the appellant. It is not necessary to make reference to the other facts of the case except that, during the course of investigation the women panchas accompanied the police party and searched the appellant and one hundred rupees currency note was found from her person under her blouse. It was argued that the said evidence should not be accepted as according to law no woman can be searched except by another woman and having regard to the provisions of Section 152 and 103 of the Criminal Procedure Code that cannot be done in the presence of men. The Supreme Court held that such a search though an irregularity was contrary to the spirit or even the letter of the Criminal Procedure Code.

18. In spite of the observations made by the Supreme Court in the Judgment reported in AIR

1962 (SC) 1189, that the search of a lady accused conducted in the presence of a male panch is contrary to the spirit or even the letter of the Criminal Procedure Code, and the observations of this Court in case reported in 1994-I-FAC 285(Bombay) that ladies should be searched in secluded place, we are distressed to find that the correct procedure is still not being followed by the investigating agencies. In some cases with which we had an occasion to deal, we have noticed that the necessary care is not taken by the investigating officers while conducting search of the female accused. We find that though in some cases the investigating agencies adhere to sub-section (5) of Section 50 of the NDPS Act, they do not follow it up by bringing in lady panchas and by taking the lady accused to a secluded place."

4. In the present case the applicant Henna Shah, a female was searched, that is her person was searched within the gaze of males. Prima-facie, it appears that the applicant Henna Shah was not searched in seclusion and in the absence of any male person. That there is a contravention of Section 50(4) of NDPS Act, 1985 and the provisions in its spirit have been violated as has been laid down by the Division Bench of this Court in the case of *Mrs. Veenela Tilak (supra)*. The provision envisages regard for the person and privacy of a female and the same is not honoured by the mere fact of the search being carried out by a female constable. Section 50(4) of NDPS Act additionally requires that the female accused be searched in

seclusion and to the exclusion of males. It is, therefore, reasonable to believe that the applicant has not committed an offence punishable with imprisonment for more than five years as contemplated under the provisions of NDPS Act, 1985. It further prima-facie appears that there is no reasonable belief that she is likely to commit an offence punishable under the NDPS Act if released on bail.

5. As far as applicant Shahid Choudhary is concerned, witness Mahadeo Chabukswar, a police constable attached to Anti Narcotics Cell, Crime Branch, Thane in his statement dated 30th July 2015 has stated that under the instructions of police sub-inspector Mr. Walzade, he took search of the person of the applicant. Section 42 of the NDPS Act envisages that any such officer (being an officer superior in the rank of peon, sepoy, constable) apart from the other department, the police department of the State Government is empowered to take search of a person as contemplated under the said Act. The Government of Maharashtra has issued a circular dated 14.11.1985 in exercise of powers conferred by sub-section 1 of Section 42 of NDPS Act, whereby prescribing that all the officers of and above the rank of head-constable in the State

of Maharashtra are permitted to take search as contemplated under Section 42 of the NDPS Act. In view of the categorical admission given by Mr. Mahadeo Chabukswar in his statement dated 30 July 2015, in view of this Court, there is a clear breach of Section 42 of the NDPS Act. It is, therefore, reasonable to believe that the applicant Shahid Choudhary has not committed an offence punishable with imprisonment for more than five years under the NDPS Act. Taking into consideration the available record, there is reason to believe that the applicant is not likely to commit an offence punishable under the NDPS Act, if released on bail.

6. In view of the above, the applicants have made out a case for their release on bail.

Hence, the following order :-

- (i) The applicants be released on bail in CR No.II-3093/2015 registered with Vartak Nagar Police Station, Thane on their furnishing PR bond of Rs.50,000/- each with one or two solvent sureties from Mumbai, Thane or Palghar Districts, in the like amount.
- (ii) After their release from jail, the applicants shall attend the ANC, Thane on every first Monday of the month and also

all the dates before the trial Court.

(iii) Any two consecutive defaults will attract the provisions of cancellation of bail.

(iv) The applicants shall not tamper with the evidence and/or influence the prosecution witnesses.

7. The applications are allowed in the aforesaid terms.

(A.S. Gadkari, J.)