

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

CRIMINAL BAIL APPLICATION NO.302 OF 2018

Moiz Shabbir Lokhandwala

.. Applicant

Vs.

State of Maharashtra

.. Respondent

.....
Mr.Taraq Sayyed a/w.Ms.Lochan Chandka, Advocate for the Applicant.

Mr.A.R. Kapadnis, APP for Respondent - State.

Mr.Nitin Ghalkar, API, Wagle Estate Police Station, present.
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CORAM : PRAKASH D. NAIK, J.

DATED : OCTOBER 15, 2018.

P.C. :

The applicant is seeking bail in connection with C.R.No.II-59 of 2017, registered with Mumbra Police Station, District-Thane, for the offences punishable under Sections 8 (c) 22 and 29 of The Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS", for short).

2 The case of the prosecution is that on 12th June, 2017, information was received through the informant that one person aged about 22 to 25 years would come near Mumbra railway

station for the purpose of selling 100 to 150 grams "Katamine". The information was recorded in information book. The information was forwarded to the superior officer. In pursuant to that letter was issued by superior officer to initiate action in respect to information received by the officer. Thereafter, the investigating machinery arranged panchas and trap was laid on 12th June, 2017. They collected drug detection kit and proceeded for raid. one person who matched with the description came at the spot. He was apprehended. He disclosed his name as Gulfam Shaikh. He was appraised purpose of search and right under Section 50 of NDPS Act. He was found in possession of white crystal powder weighing 110 grams. On testing it was found to be Ketamine. The said contraband was seized from the possession of the said accused and the complaint was lodged for the offences punishable under Sections 8(C) read with 22 and 29 of NDPS Act. The value of the contraband was Rs.2,20,000/-. The said accused Gulfam Shaikh was arrested. During the course of investigation, the arrested accused disclosed that the contraband was given to him for sale by Shahrukh Khan and he is likely to come at Mumbra Parsik Nagar to sell drug. Accused Shahrukh Khan was arrested on 3rd July, 2017. On 3rd July, 2017, arrested accused Shahrukh Shaukat Khan found in possession of 51 grams

mephedrone. He disclosed that the said contraband was purchased by him from Moiz Shabbir Lokhandwala from Thakurkpada, Mumbra, District-Thane. He also disclosed that the said person sells mephedrone powder during night time between 12:00 hrs. to 1:00 a.m. On receipt of the said information, it was decided to lay trap to apprehend the said person. Panchas were arranged. Panchanama was recorded on 6th July, 2017. The raiding party reached at the spot where the suspect was supposed to sell the contraband. It was noticed that the accused-applicant was standing near the railway station in a suspicious circumstances. Accused Shahrukh pointed out the accused as the person referred by him. He was apprehended. Since it was raining and due to insufficient light, he was taken to Mumbra Police Station, District-Thane, which is situated near the said place. He disclosed his name. He was appraised of his right under Section 50 of NDPS Act. On search, he was found in possession of white coloured crystal powder, mobile phone and cash of Rs.1200/-. On inquiry about the powder recovered from him, he disclosed that it was mephedrone. The said fact was ascertained by the raiding party. The contraband was seized. The said person was arrested. The panchanama of arrest was recorded. On completing investigation, charge - sheet was filed.

3 Applicant preferred an application for bail before the NDPS Special Court. The said application was rejected on 10th January, 2018.

4 Learned advocate for the applicant submitted that the prosecution case suffers from inherent infirmities. The applicant has been falsely implicated in this case. The main accused in the present case, namely, Gulfam Shaikh, has been released on bail vide Bail Application No.1519 of 2017. The information regarding involvement of the present applicant was allegedly received from the co-accused Shahrukh Khan was not placed before the authority. The alleged information was in respect of offence of NDPS Act, therefore, it was warranted to comply the provisions of Section 42 of the NDPS Act. There is total non-compliance of the said provisions. On receipt of information about the fact that the applicant is likely to visit the place of incident having in his possession the contraband. It was expected that the procedure contemplated under Section 42 of the NDPS Act, would be complied by recording the information and forwarding the same to the appropriate officer. Learned counsel adverted to the provisions of Section 42 of the NDPS Act. It is further submitted that the arrest panchanama as well as recovery panchanama is

not genuine. It is submitted that the information was received that the applicant accused sells mephedrone from 12:00 hrs. onwards. Police then decided to conduct raid and apprehended the accused. The information was received on 6th July, 2017, and the applicant accused was apprehended. Contraband was allegedly recovered beyond 12:00 hrs. Panchanama was recorded from 00:15 hrs to 02:30 a.m. In the circumstances, the date of arrest and recording of panchanama of seizure would be 7th July, 2017 and not 6th July, 2017. It speaks volume of doubt about the genuineness of the prosecution case.

5 Learned counsel for the applicant relied upon the following decisions:

- (a) ***Anwar Hussain Mohd. Idris Ansari Vs. State of Maharashtra & Ors.***¹;
- (b) ***Sarija Banu Vs. State***²;
- (c) ***Suresh Somraju Ali Vs. The State of Maharashtra***³, and;
- (d) ***Mahinder Kumar Vs. State of Goa***⁴.

6 Learned APP submitted that there are no discrepancies in the evidence collected by the prosecution. The

1 2001 Bom. C.R. (Cri.) 694

2 (2004) 12 SCC 266.

3 Cri.Application No.143 of 2011, dt. 22.02.2011.

4 AIR 1995 (SC) 1157

applicant was found in possession of 70 grams of mephedrone, which was a commercial quantity. Trap was arranged by the raiding party. The arrest of the applicant was pursuant to the statement of co-accused Shahrukh Khan, who was arrested on 3rd July, 2017. It is submitted that the said co-accused has disclosed that he had purchased mephedrone from the applicant - accused and that he sells the contraband at the place mentioned therein and at the time disclosed by him in his statement. It is, therefore, submitted that the information was received during the course of investigation. When the information was received for the first time on 12th June, 2017, that accused no.1 is likely to visit the place for selling Ketamine the same was recorded and forwarded to the appropriate authority for compliance of Section 42 of NDPS Act. It was not necessary to again record the information. It is further submitted that the discrepancies in the panchanama do not demolish the prosecution case. The applicant - accused was appraised of his right under Section 50 of NDPS Act. It is further submitted that the decisions relied upon by the applicant are not applicable in the present case. There is sufficient compliance of Section 42 of NDPS Act. The co-accused was granted bail. Considering the nature of contraband recovered from him, the applicant is not entitled for bail on the ground of

parity. It is further submitted that the alleged infirmities adopted by the learned counsel for the applicant are based on disputed facts and the same are required to be considered at the stage of trial.

7 I have perused the charge - sheet. The information with regards to involvement of accused no.1 was received on 12th June, 2017. The said information was recorded in writing and forwarded to the concerned authority. After obtaining approval, the police proceeded to trap the accused. Panchanama was recorded. The accused no.1 Gulfam Shaikh was found in possession of 110 grams of Ketamine. He disclosed that the contraband was purchased from Shahrukh Shaukat Khan (accused no.2). On receipt of said information, the investigating machinery has arrested accused no.2, vide panchanama dated 6th July, 2017. Accused no.2 disclosed that mephedrone was purchased by him from the applicant - accused. Accused no.2 Shahrukh Khan was found in possession of 70 grams of mephedrone. The said accused disclosed that the applicant-accused is selling the contraband at a particular place and at particular time. Hence, the investigating machinery proceeded to the said place on 6th July, 2017, and apprehended the applicant.

The said fact is reflected in panchanama dated 6th July, 2017. The discrepancies with regards to time of recording of panchanama is minor in nature, which would not discard the authenticity of the panchanama. At the most, this issue can be agitated during trial. It is apparent that the arrest of the applicant was during the course of interrogation of accused no.2. Accused no.2 was arrested during the course of interrogation of accused no.1 and accused no.3 (applicant) was apprehended in pursuant to the information disclosed by accused no.2. It was not necessary to again record information under Section 42 of NDPS Act, and, forwarded it to superior authority. The recovery of the contraband from the applicant is not a separate offence and it is part of the offence committed on 12th June, 2017. The recoveries are interlinked with each other. Thus, there is no substance in submission advanced by the learned counsel for the applicant. There is compliance of Sections 42 and 50 of NDPS Act.

8 Learned counsel relied upon the decision in the case of **Anwar Ansari (Supra)**. The said decision was rendered while dealing with the appeal against conviction. The Court had considered whether the statement made by one of the accused leading to discovery of contraband at two places is a statement

under Section 27 of Indian Evidence Act. The evidence indicated that witness did not admit that the said accused had made statement inculcating himself and the evidence was that police visited the place and recovered contraband. The Court analysed evidence and observed that statement of accused is not further information regarding haul concealed in the place and trial Court did not consider whether it was information attracting Section 42 of NDPS Act. The Court relied on decision of Mahinder Kumar and held that there is no compliance of Section 42 as the information by accused was not forwarded to higher officer. The decision is delivered after trial and Appellate Court has scrutinize evidence. The facts of the case also do not apply to the present case. In the case of ***Mohinder Kumar (Supra)***, the Supreme Court has dealt with the applicability of Sections 41, 43 and 50 of the NDPS Act, in the factual matrix of the said case. In the said case, search and seizure took place between 7:45 p.m. and 8:00 p.m., after sunset. It was contended that there was violation of the aforesaid provisions. In the said case, the patrolling party had accidentally reached the house and on noticing the conduct of the accused, who tried to run in to the house on seeing the police, the police effected search, seizure and arrest. The seizure was not on prior information, but, the police had accidentally stumbled upon

the articles and not empowered to do the work on coming to know about the accused being in custody of the offending articles. In the circumstances, it was observed that from the time when said officers had reason to believe that the accused were in custody of narcotic drugs and sent for panchas. They were under an obligation to proceed further in the matter in accordance with the provisions of the NDPS Act. In the facts it was observed that officer did not forward the copy of the grounds to the Superior Officer, as required by Section 42(2) of the NDPS Act, as he has not made any record under the provisions to Section 42(1) of the NDPS Act. Thus, from the aforesaid observations, it is crystal clear that the factual aspects of the said case are not applicable in the present case. The decision in the case of **Sarija Banu (Supra)**, is with regards to the compliance of Section 42 of the NDPS Act, and, appreciation of such issue while considering the application for bail. The other decisions relied upon by the counsel for the applicant in the case of **Suresh Somraju Ali (Supra)**, is also relating to compliance of Section 42, and, grant of bail for non-compliance of such provisions. Section 42 of the NDPS Act, relates to power of entry, search, seizure and arrest without warrant of authorisation. If the officer referred to in the said provision has reason to believe from persons knowledge or

information given by any person and taken down in writing that any narcotic drug or psychotropic substance, or controlled substance in respect to which an offence punishable under the Act has been committed may perform action stipulated in the said provision and where an officer takes down any information in writing under Sub-section (1) or records grounds of his belief under the proviso he shall within seventy two hours send copy to immediate official superior. In the present case information from informant was received on 12th June, 2017, which was recorded in accordance with Section 42 and also forwarded to superior officer. Accused no.1 was arrested. Contraband was recovered from him. Subsequently, accused no.2 was arrested with contraband and on his statement that he has purchased the contraband from accused no.3 and that he sells it at particular place and time, the applicant (accused no.3) was arrested. There is no necessity to record the statement of accused as information under Section 42, and comply the said provisions. Section 42 refers to information received from any person which was recorded in present case on 12th June, 2017 and Section 42 is complied. For the reasons stated hereinabove, the submissions advanced by the counsel for the applicant cannot be considered, and, hence, the application is required to be rejected.

9 Hence, I pass the following order:

:: ORDER ::

- (i) Bail Application No.302 of 2018, stands rejected.

(PRAKASH D. NAIK, J.)