

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

CRIMINAL BAIL APPLICATION NO.7 OF 2019

Moiz Shabbir Lokhandwala	.. Applicant
Vs.	
State of Maharashtra	.. Respondent

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Mr.Ayaz Khan, Advocate for the Applicant.
Prashant Jadhav, APP for the Respondent – State.

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**CORAM : PRAKASH D. NAIK, J.
(CHAMBER MATTER)**

DATED : APRIL 23, 2019.

P.C. :

1) This is a second application for bail before this Court. The first application viz. Criminal Bail Application No. 304 of 2018 was rejected by this Court vide order dated 15th October, 2018.

2) The prosecution case is that the information was received on 12/06/2017, that one person is coming with Ketamine near M. Kamani, Mumbra Railway Station to sell the contraband to his customers.

3) The information was reduced into writing. Accused No. 1 was apprehended on the spot. His search resulted in recovery of 110 grams of Ketamine. During the course of investigation, name of Accused No. 2 was revealed by Accused No. 1. On 3rd July, 2017, information was received that Accused No. 2 is selling MD at Parsiknagar circle, Retibunder Mumbra Road, Thane. He was apprehended. He was found in possession of 51 grams of Mephedrone. On 6th July, 2017, Panchnama was drawn on the instance of Accused No. 2, in which he disclosed that the applicant is supplier of Mephedrone. It was further informed by Accused No. 2, that the applicant would come at Mumbra M. Kamani Railway station in the night between 12 to 1 hours for selling mephedrone. In pursuant to that, the applicant was apprehended. Plastic bag containing white powder recovered from him. The bag was containing 70 grams of Mephedrone. The statement of witnesses were recorded and charge-sheet is filed.

4) Learned Advocate for the applicant submitted that although

the earlier application is rejected by this Court, the present application is preferred on new facts revealed in pursuant to rejection of earlier application and new ground averred in this application. It is contended that Panch Riyaz Sartaj Khan who is alleged to be Panch in respect of arrest Panchnama of applicant, dated 6th July 2017, has already acted as Pancha in the Panchnama dated 3rd July, 2017, in the present case, wherein there was alleged recovery from accused No. 2. He is an habitual and amenable Panch. He has acted as Panch in number of cases. The list of cases in which he acted as Panch has been provided in the application. In the application, copies of the Panchnama are also annexed to this application. It is submitted that Riyaz Sartaj Khan has acted as Pancha in C. R. No. II-10 of 2017 registered with Kasarwadawali Police Station in Panchnama dated 4/4/2017, C. R. No. II-38 of 2017 registered with Kalwa Police Station in Panchnama dated 7/7/2017, C. R. No. II-38 of 2017 in Panchnama dated 21/08/17, C. R. No. II-166 of 2017 registered with Mumbra Police Station in Panchnama dated 23/12/17, C. R.

No. II-16 of 2018 registered with Thane Nagar Police Station in Panchnama dated 22/03/2018 and C. R. No. II-116 of 2017, registered with Mumbra Police Station in Panchnama dated 17/11/2017. It is submitted that all these cases were investigated by Anti Narcotic Cell, Thane.

5) Learned Counsel pointed out Panchnama wherein Riyaz Sartaj Khan has acted as Panch, which are annexed to this application. Learned Counsel also pointed out the names of the police officers who were members of the raiding party in the aforesaid cases and contended that same officers were part of the raiding party in the present case. It is submitted that same officers attached to Anti Narcotics Cell had utilised services of the said Pancha. Riyaz Sartaj Khan has acted as Pancha in the cases which are registered prior to the present case and even thereafter which show that the Panch is amenable to police and he is stock witness. Reliance is placed on the decision of the Apex Court in the case of Rajesh Jagdamba Avasti V/s State of Goa¹, Hira Lal S/O Kesho Ram

¹ (2005) (9) SCC 773

V/s State of Hariyana². Reliance is also placed on order dated 21st February 1994 passed by this Court in Criminal Application No. 375 of 1994, Order dated 23rd November 1992 passed by this Court in Criminal Bail Application No. 3298 of 1992, order dated 13th January 1992 passed by this Court in Criminal Application No. 3217 of 1991. Learned Counsel also placed for consideration the decision of this Court in the case of Usman Haidarkhan Shaikh V/s State of Maharashtra³ and Mohd. Hussain Babamiyan Ramzan Vs. State of Maharashtra⁴.

6) Learned Counsel for the applicant further submitted that the search was conducted in the absence of the Gazetted officer which also amounts to violation of Section 50 of the NDPS Act. He submitted that it was mandatory for the respondents to conduct the personal search of the applicant in the presence of the Gazetted officer. However, there was no such officer present during the search and seizure of the complainant. The members

2 AIR (1971) (SC) 356

3 (1991) Cr. L. J. 232

4 (1994) Cr. L.J. 1020

of raiding party did not include any Gazetted officer. The search and seizure vitiated as it infringes the mandate under Section 50 of the NDPS Act. In support of his submission, he relied upon the recent decision of the Apex Court in the case of Arif Khan @ Agha Khan V/s State of Uttarakhand⁵. Reliance is also placed on the decision of High Court of Punjab and Haryana at Chandigarh and submitted that in the said case the Court was pleased to grant bail to the accused on non compliance of Section 50 of the NDPS Act wherein search was conducted in the absence of Gazetted officer.

7) Learned APP submitted that there is no change in the circumstances. The earlier application was rejected by assigning reasons. Merely on the ground that Panch Riyaz Sartaj Khan is used in several Panchnama cannot discard his evidence at this stage. The prejudice if any has to be adjudicated at the time of trial. It is further submitted that the other issue relating to the search being conducted in the absence of gazetted officer is also required to be considered at the time of trial. Ultimately, the

⁵ AIR 2018 (SC) 2123

contention of applicant is that there is violation of Section 50 of the NDPS Act. In the case of State of Punjab Vs. Baldev Singh⁶, the Court has observed that the question relating to compliance of Section 50 has to be considered at the time of trial.

8) I have perused documents on record. The earlier application preferred by applicant was rejected by this Court vide order dated 15/10/2018.

9) It is pertinent to note that the trial is yet to commence. The evidence of the said witness acting as Pancha cannot be discarded at this stage. In the case of State of U.P. Vs. Zakaullah⁷, the observation of the Supreme Court in paragraph 10 can be quoted as follow :

“10 The necessity for “independent witness” in cases involving police raid or police search is incorporated in the statute not for the purpose of helping the indicted person to bypass the evidence of those Panch witnesses who have had some acquaintance with the police or

6 1999 SCC 172

7 AIR 1998 SC 1474

officers conducting the search at some time or the other. Acquaintance with the police by itself would not destroy a man's independent outlook. In a society where police involvement is a regular phenomenon many people would get acquainted with the police. But as long as they are not dependent on the police for their living or liberty or for any other matter, it cannot be said that those are not independent persons. If the police in order to carry out official duties, have sought the help of any other person he would not forfeit his independent character by giving help to police action. The requirement to have independent witness to corroborate the evidence of the police is to be viewed from a realistic angle. Every citizen of India must be presumed to be an independent person until it is proved that he was a dependent of the police or other officials for any purpose whatsoever.”

10) Thus, the authenticity of the evidence the Panch referred to in the present case will have to be determined at the time of trial. In the case of Nana Keshav Lagad V/s. State of Maharashtra⁸, the Supreme Court has observed that merely because Panch witness in question had tendered evidence in another case, it cannot held on that score alone that his evidence should be rejected. In the decision rendered by this Court in Benard Chapanga, it was observed that acting as Panch witness in previous cases does not

⁸ (2013) 12 SCC 721

by itself disentitle his creditworthiness. A citizen cannot be stamped to be a liar unless his evidence has been examined with proper approach guarded by normal human experience and prudence of prudent person. In paragraph 8 while summing up it was observed as follows:

" Thus, summing up the ratio of the judgments cited above, and proper interpretation of the independent character of the witnesses, some important aspect will have to be considered and kept in view, it can be enumerated for consideration. Its limited listing would not be a proper one. There would be other factors also which would weigh at the time of considering the independent or dependent character of the witness who had acted as a Panch witness for police in raids or seizures. They can be numbered but cannot be limited. (1) the status of such witness in the society, (2) whether such witness is amenable to police influence, (3) whether such witness has ground to be afraid of police or such raiding agency - Whether such person has any cause to beg for the favour of police or such raiding agency, (4) whether such person can afford to displease the police or such raiding agency, (5) whether such person can remain fearless and can refuse the request of police or such agency to act as Panch witness for untruthful case but has accepted to act as Panch witness only for helping the cause of law and justice in truthful case. (6) whether such person has any independent source of livelihood or whether he is dependent on police or such raiding agency for his livelihood or his status in the society, (7) whether the witness has regard to the rule of law and therefore has acted as a Panch witness or a witness, (8)

whether such a witness is law abiding person and himself happens to be a disciplined and law regulated person, (9) whether he is found to be law breaking person, whether there is any suspicious things in his ways of livelihood, behaviour or conduct. (11) whether police or such raiding agency had asked him the questions about his impartiality to acting as a Panch witness or his participation in former cases of traps, raids and seizures.”

11) The prejudice if any has to be proved in evidence and without examining the said witness, the fact that he has acted as Panch for search and seizure for the applicant cannot be discarded. The decisions in cases of Rajesh Jagdamba (supra), Hiralal (supra), Usman Haidarkhan Shaikh (supra) and Mohd. Husain Ramzan (supra) relied by advocate for applicant were delivered at the stage of appeal while appreciating evidence and in facts of these cases. The orders granting bail relied by applicant cannot be considered in view of observations made herein and since the trial has not yet commenced. The embargo under Section 37 of NDPS Act cannot be brushed aside while dealing with such issue at this stage for grant of bail.

12) The other submission is that search and seizure of the applicant was conducted in the absence of gazetted officer. Ultimately the submission of the Learned Counsel for the applicant is that the absence of the Gazetted officer during search and seizure amounts to violation of Section 50 of the said Act. It is also contended that recovery/seizure would vitiated.

13) Learned Counsel has strongly relied upon the decision of the Apex Court in the case of Arif Khan. The said decision was rendered after the trial was conducted and while dealing with the appeal by the Apex Court.

14) The issue of compliance of Section 50 can be agitated during the trial. The Constitution Bench in the decision referred to above, has dealt with the issue with regards to compliance of Section 50 and has also observed as to in what manner the compliance is required to be done. The question regarding compliance of Section 50 is again dealt with in the case of

Vijaysinh Jadeja Vs. State of Gujarat⁹.

15) It is pertinent to note that in the decision of Constitution Bench in the case of State of Punjab Vs. Baldev Singh and in the case of Vijaysinh Jadeja Vs. State of Gujarat, has dealt the issue relating to compliance of Section 50 of the NDPS Act. The ratio of the said decision does not indicate that at the time of search and seizure the presence of the Gazetted officer is mandatory. The Apex Court further dealt with the appraisal of the right contemplated under Section 50 and after the appraisal if the suspect requires that he should be searched before the Gazetted officer or the Magistrate, the requisition is required to be complied with. In any case the Apex Court has also observed that issue relating to compliance of Section 50 is matter of evidence and dealt with at the time of trial. In Paragraph 33 of the said decision it is observed that the question whether or not the safeguards provided in Section 50 were observed would have to be determined by the Court on the basis of evidence led at the

9 2011 (1) SCC 609

Trial and the finding on that issue one way or the other, would be relevant for recording an order of conviction and acquittal. Learned Advocate relied on decision of Punjab and Haryana High Court and submitted that bail was granted in similar circumstances. The observations of the apex Court in the case of State of Punjab V/s Baldev Singh (supra) were not considered by the said Court.

16) In the light of the aforesaid observations no case for granting bail is made out. Hence the application deserves to be rejected. Hence, I pass following order :

ORDER

Criminal Bail Application No. 7 of 2019 is rejected.

(PRAKASH D. NAIK, J.)