

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO.891 OF 2020

Kalu Sahebrao Mohite .. Applicant
Versus
The State of Maharashtra .. Respondent

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Mr.Pritam Runwal for the Applicant.

Mrs.A.A.Takalkar, APP for the State.

CORAM: BHARATI DANGRE, J.
DATED : 21st OCTOBER, 2020

P.C:-

1. The applicant is seeking bail, since charge-sheeted in relation to C.R.No.16 of 2018 registered with ANC, Azad Maidan Unit, Mumbai for the offences punishable under Sections 8(C), 20(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, “the NDPS Act”).

2. After filing of the charge-sheet, the applicant moved an application before the Special Judge, Greater Mumbai, which was rejected. Failure of his attempt to seek release in the wake of pandemic on 19th August, 2020 has constrained him to approach this Court.

3. The learned counsel for the applicant, in the backdrop of the charge-sheet, submit that the applicant has been falsely

implicated in the present offence and there is no evidence against him in the form of any incriminating material. The submission is that the applicant had taken a lift in the alleged Balero pick-up jeep coming to Mumbai and he was totally unaware about the presence of contraband i.e. ganja in the alleged pick-up jeep. He has no concern whatsoever with the other co-accused nor they are his friends or relatives. According to the learned counsel, there is no recovery of any narcotic drug or incriminating article from him nor any statement contained in the charge-sheet, assign any role to him as alleged in the complaint. He is neither the owner of the vehicle nor possess the said pick-up jeep. He goes further and argue that going by the charge-sheet, there is no meeting of mind of the applicant with the co-accused and merely because they were travelling together and having the same surname would not be sufficient to implicate him.

The learned counsel for the applicant has vehemently argued that there is no compliance of the mandatory provisions of the Act and in particular Sections 42, 50, 55 and 57 of the NDPS Act. According to the counsel, alleged raid was conducted on Service Road after crossing the Airoli Bridge and, hence, the official superior within whose jurisdiction the offence was allegedly committed should have ensured the compliance of the provisions. The search was conducted before sunrise, without any authorisation under Section 40(1)(2) of the NDPS Act and there was no Gazetted Officer present at the time of conduct of the alleged raid is the submission of the learned counsel. He also

would advance his submission pointing out the discrepancy of the samples carried by the carrier and the CA Report that was received. Further, accused No.2-Nandlal has been released on bail by this Court is an another submission.

4. It would be necessary to delve into the factual aspects to consider the submissions of the learned counsel.

On 12th March, 2018, at around 20.00 hrs., the In-charge Inspector Santosh Bhalekar received an information that on 13th March, 2018, at around 6-7 a.m. in the morning, a white colour Balero pick-up jeep bearing No.MH-05-8724 would be arriving in Mumbai with huge quantity of ganja and the said jeep would pass through Mulund Checknaka. The said details were scribed in the station diary and it was recorded that the necessary steps under the NDPS Act should be immediately initiated.

5. The information was further transmitted to the Deputy Commissioner of Police in the Narcotic Cell, Mumbai, Assistance Commissioner of Police in the Narcotic Cell and Senior Police Inspector (Administration). The chage-sheet contain the relevant material. In station diary, the entry was recorded on 12th March, 2018 at 21.20 hrs. The letter by Deputy Commissioner of Police, ANC, DCB, CID, Mumbai dated 12th March, 2018 addressed to PI Santosh Bhalekar with reference to the secret information is also included in the charge-sheet. By the said letter, the Deputy Commissioner of Police had

authorised Assistant Police Inspector Pramod Kumbhar in exercise of power by an empowered officer as per Section 41(2) of the NDPS Act to conduct the raid and carry out search, seizure and arrest under the NDPS Act. The learned counsel has argued that the reference here is to the secret information SDE No.10 of 2018 dated 12th March, 2018 and according to him, this do not match with the station diary entry. Pertinent to note that the entry, which has been produced on record, is undisputedly of 12th March, 2018, but the number 10 of 2018 cannot be reflected. This can be ascertained on perusal of the entire station diary, which carry No.10 of 2018. The panchanama before raid dated 13th March, 2018 is also part of the charge-sheet, which clearly depict that the panchas were armed with the necessary material to conduct the raid as per the instructions of API Kumbhar. The panchanama continues on 13th March, 2018 and in detail, record the process of conduct of raid, preceding the location of the white colour Balero by the number in respect of which, the tip was received. The said vehicle when stopped, had three persons sitting in the cabin. The said three persons were shown the identity cards and introduced to the panchas and the raiding party. The vehicle was being driven by Sanjay Mohite-resident of Malegaon, District Nashik. Other two persons were identified as Nandlal Beldar and Kalu Mohite i.e. the present applicant who is the resident of Nashik.

6. The purpose of search of the vehicle and search in person was explained to the accused persons. The panchanama clearly mention that the API Kumbar appraised the accused persons of their rights pertaining to search, seizure and arrest. The panchanama specifically record that they were also made aware of the right available to them under Section 50 of the NDPS Act, to have the search being conducted by any Gazetted Officer of any department or the Magistrate, if they desire, so the necessary arrangement can be made to that effect. It is recorded that all the three accused persons declined to avail such an opportunity. Thereafter, they were given a letter in writing about the available right, the contents of which were read over to them and the accused persons, including the present applicant signed on the said letter in presence of the panchas. The panchas had also signed the said document. Personal search of all the three accused persons was conducted. All the accused persons were interrogated about the contents of the gunny bags. After personal search, the Balero vehicle was also subjected to search, which contained 20 gunny bags. They were downloaded and in that gunny bags, a white colour powder substance was found. When inquired, three accused persons answered that it was ganja. They also responded by stating that the weight of ganja was 500 kg. This was the contraband, which was recovered from the gunny bags and which were being transported in the truck.

From the 13 gunny bags, which contain ganja, 50-50 grams were separated for the purpose of testing and packed in the transparent plastic bags (total 26 bags). The bags were stapled and transformed into a brown colour paper pack and all these 26 bags came to be sealed. The panchanama mention that the procedure was completed and apart from the contraband found in the gunny bags, no further incriminating material was found on the person of the accused persons.

7. The FIR came to be registered on the information by API Nitin Bodhe on 13th March, 2018 and the ganja was found to be worth Rs.One Crore. The charge-sheet contain the details of the panchanama and the procedure adopted by the raiding team. The charge-sheet also contain the statement of the carrier and the Chemical Analyser Report dated 14th March, 2018 is in respect of 13 samples, which is analysed to be a contraband. The submission of the learned counsel for the applicant about the discrepancy about number of bags has no merit as 13 packets were forwarded, each containing 50 gm of contraband from the 13 gunny bags and the report has been received in respect of the said bags. The statement of the carrier on record correspond the journey of the contraband to the Chemical Analyser for the purpose of its analysis.

8. In order to consider the submission of the learned counsel for the applicant about the non-compliance of the statutory

provisions, the perusal of the material in the charge-sheet clearly divulge the procedure followed and there is a clear compliance of Section 42. The Anti Narcotic Cell (ANC), on 12th March, 2018, has received information from API Prashant More informing that Azad Maidan Unit, Thane recorded any entry to that effect on 12th March, 2018. This information was received from In-charge Police Inspector Bhalekar. The extract of entry of Azad Maidan Unit also finds place in the charge-sheet. The Deputy Commissioner of Police, ANC addressed a letter to Santosh Bhalekar, ANC, Azad Maidan Unit authorising API Pramod Kumbhar to conduct the raid, carry out search, seizure and arrest under the NDPS Act. The panchanama divulge the details of the procedure followed and reflect that the procedure contemplated under Sections 42 and 43 has been complied with.

As far as the compliance of Section 50 is concerned, i.e. also reflected in the charge-sheet. The accused persons were made aware of their right to be searched in presence of the Magistrate or the Gazetted Officer, but they chose not to avail the said right.

9. The submission of the learned counsel for the applicant that the non-compliance of the said procedure would vitiate the trial and, therefore, the applicant is entitled to be released on bail has been very well dealt with in the judgment of the Constitution Bench in case of ***State of Punjab Vs. Baldev Singh***¹. The

¹ (1999) 6 SCC 159

compliance of Section 50 of the NDPS Act has been held to be mandatory, obliging the officer concerned to inform the person to be searched of his right to demand that search could be conducted in the presence of the Gazetted Officer or Magistrate. However, it has also been held that after being informed, whether such a person opted for such a course or not would be question of fact. The safeguard procedure incorporated in Section 50 is to ensure that the persons are only searched with a good cause and to maintain the veracity of evidence derived from such search. This, however, would be required to be established at the time of trial and the burden would be on the prosecution to establish that the empowered officer has conveyed the information to the concerned person of his right of being searched in presence of the Magistrate or a Gazetted Officer at the time of intended search. It has been held that the Courts will have to decide at the trial of the case about due compliance with the requirement provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the Court that mandatory compliance of Section 50 has been ensured. The following observations in the judgment by the Constitution Bench would answer the objection of the learned counsel for the applicant.

“33. The question whether or not the safeguards provided in Section 50 were observed would have, however, to be determined by the court on the basis of the

evidence led at the trial and the finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish at the trial that the provisions of Section 50, and particularly, the safeguards provided in that section were complied with, it would not be advisable to cut short a criminal trial.”

10. Para 56 of the said judgment would make things more clear.

“56. On the basis of the reasoning and discussion above, the following conclusions arise :

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That, a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;

(4) -----

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut-short a criminal trial;

(6) That in the context in which the prosecution has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

Thus, the challenge to the compliance of Section 50, as raised by the learned counsel, cannot be conclusively lead to an acquittal unless and until the trial has been conducted and the prosecution establish that there was a compliance of Section 50. At the stage of bail, the said factor cannot be taken into account.

11. The learned counsel for the applicant has placed reliance on several judgments. As far as the judgment in case of ***Guman Singh Vs. State of H.P.***² is concerned, it is for the proposition that the two accused persons were not having knowledge that the third accused was carrying some contraband. The facts of the

² 2013 Cri.L.J. 4973

said case ultimately discern that no evidence was available on record nor any investigation was conducted to show any proximity, friendship or relationship *inter se* the accused persons. It was held that since conscious and exclusive possession not proved, the accused were entitled to be acquitted.

The said judgment is not of any succor to the applicant. The learned APP has placed on record the CDR details between accused No.1-Sanjay Mohite and the applicant. On 12th March, 2018 itself, the CDR established that the applicant was in touch with Sanjay Mohite, who was driving the vehicle. Further, the learned APP state that during the course of investigation, it is revealed that the accused were known to each other and are distantly related. She further state that the investigation reveals that the accused persons were a part of a group dealing in trading of narcotics.

12. The learned APP has placed reliance on judgment of this Court in case of ***Siraj Shaikh Nasir Munshi Vs. The State of Maharashtra***³, which has also dealt with a similar submission of violation of Section 50 of the NDPS Act. Relying on the judgment in case of *Baldev Singh* (supra), the learned Single Judge has arrived at a similar interference that the issue relating to compliance of Section 50 of the NDPS Act is a matter of evidence and would be required to be dealt with at the time of trial.

³ (2019) 4 MLJ (Crl) 1

13. On perusal of the entire material contained in the charge-sheet, it cannot be said that the applicant is innocuous or he was not in conscious possession of the contraband. The material in the charge-sheet do not indicate that the applicant accidentally happened to travel in the Balero. The applicant was in touch on mobile with accused No.1, who was driving the Balero and, therefore, the ratio in case of *Guman Singh* (supra) cannot be made applicable to him.

14. The judgment of Madhya Pradesh High Court in case of ***Kalekhan vs. State of MP***⁴ dealt with the case where the accused was the owner of the case in which opium was found and it was held that this itself may not be sufficient to sustain a charge under Section 25 of the NDPS Act unless it is established that he had not only permitted the car to be used in commission of offence.

The reliance on judgment of Bombay High Court in case of ***Lawarance vs. State of Maharashtra***⁵ is of no relevance in light of the judgment of the Constitution Bench in case of *Baldev Singh* (supra).

The judgment in case of ***NCB vs. Sukh Dev Raj Sodhi***⁶ reiterate the position of law about the mandatory compliance of Section 50 of the NDPS Act. This being the settled position of law, which has been recognised by the Constitution Bench, the

4 1990 Cri.L.J. i 1119

5 1992 Cri.L.J. 399

6 AIR 2011 SC 1939

only question is, whether the trial would stand vitiated on account of non-compliance. Since, I am bound by the Constitution Bench judgment in case of *Baldev Singh* (supra), considering the seriousness of the offence, nature of allegations and the material contained in the charge-sheet, the applicant, in my view, is not entitled for his release on bail.

15. The application is rejected.

SMT. BHARATI DANGRE, J