

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO. 378 of 2022

Haji Mohd. Abdul Kadar Bhumedia .. Applicant

Versus

The State of Maharashtra .. Respondent

...

Mr. Ayaz Khan for the applicant.

Mr.S.H.Yadav, APP for the State.

API Vilas Kute from Anti Narcotics Cell.

CORAM: BHARATI DANGRE, J.

DATED : 23RD AUGUST 2022

P.C:-

1 The applicant is charged as accused no.3 in C.R.No. 988/2020, registered at Kashmirira police station under Section 8C, 20, 22C and 29 of the NDPS Act, along with three other accused persons.

2 The applicant was apprehended on 5/1/2021. When the charge-sheet is perused, it reveal that one white colour Wagon-R occupied by two persons was intercepted by the Officers of Kashmirira police station on 21/12/2022. The search of the accused no.1 led to 250 gms of Mephedrone along with Indian currency and a mobile phone. The other person present in the car, who is the owner of Wagon-R and using the car as a taxi

through OLA and UBER services, was not found with any contraband. Two samples of 5 gms were drawn from the seized Mephedrone and the samples and the bulk quantity was separately packed and sealed, being marked as 'A1', 'A2' and 'A'.

3 The above incident resulted in registration of FIR against the accused no.1 at Kashimira police station which invoked Section 8C r/w Section 21C of the NDPS Act.

The arrested accused lead to the present applicant. The Officer of the respondent constituted a raiding team and approached the residential premises of the applicant and it is the case of the prosecution that during his personal search, one transparent plastic bag was recovered from his pant pocket. On weighing the same, it was found to be of 103 grams and it is alleged that the said substance is a contraband. Two samples of 5 grams each were prepared and the samples and bulk quantity was separately packed, sealed and marked as 'A1', 'A2' and 'A'. The panchnama record the happenings and the present applicant was arrested on 6/1/2021 on conclusion of the panchnama.

On 8/1/2021, a Memorandum panchnama was drawn at the instance of arrested accused no.2 and he led to a place situated at Ghoghari Mohalla, Dongri, and it is alleged that during the seizure panchnama, a briefcase was produced by one of his relatives from which 112 grams of Mephedrone was seized. The samples were drawn and bulk quantity was also separately

packed. Charge-sheet came to be filed on completion of investigation.

.. Learned counsel Mr.Ayaz Khan representing the applicant, would submit that the applicant has been falsely implicated in the case. Apart from alleged violation of Section 50 of the NDPS Act, the learned counsel would submit that the search of the applicant was conducted by a person who was not empowered to carry the search under the provisions of the NDPS Act. He would rely upon a notification dated 14/11/1985 issued by the Home Department, State of Maharashtra, under the NDPS Act, 1985 and he would submit that only those Officers who are mentioned in the said notification, in exercise of powers conferred by sub-section (1) of Section 42 of the NDPS Act, are the empowered Officer, who can carry out the search. He would submit that the said circular is still in force.

Mr.Khan would place reliance upon a Division Bench of this Court in case of Rolf Michael Timerick Vs. State of Goa, 1997 All M.R (Cri) 738, where the search of the accused by Head Constable though in presence of PSI and at her directions, was held to be clearly an unauthorized one as the Head Constable was not empowered to conduct the search u/s.42 of the NDPS Act and consequentially, the search was held to be illegal. Not only this, since the search was illegal, the trial was held to be vitiated and the conviction based on such trial was held to be unsustainable and was set aside.

Relying on the Division Bench decision, Mr.Khan would submit that it is only those persons who are authorized under the NDPS Act, are competent to carry the search, and since the search was carried out by unauthorized Officer, it is illegal. In absence of any other material available against the applicant, except for the seizure, according to Mr.Khan, the applicant deserve his release on bail.

4 The learned APP Mr.Yadav do not dispute the panchnama which is part of the charge-sheet, which led to the recovery of chart from the applicant.

He also do not dispute that it is only the Officers which are authorized, are entitled to carry search u/s.42 of the Act.

5 I have perused the search panchnama dated 6/1/2021 and on reading its contents, it is seen that API, Crime Branch, Pravin Swamy, directed Police Naik/1140 Wasim Shaikh to carry personal search of Haji Mohd. Abdul Kadar Bhumedia (Applicant). It record that the said person was wearing white colour full shirt with floral design and a purple colour pant. The panchnama further record that Police Naik Wasim Shaikh carried out his search and from his right pant pocket, recovered one plastic transparent bag which contain a whitish/yellowish colour powder. On his further search, he recovered a bundle of 500 rupees and a mobile phone.

On being asked about the powder, it is recorded that the applicant disclosed that it was Mephedrone, and on touching and smelling the powder, it was concluded that it is contraband.

Rest of the panchnama record the procedure which was adopting in weighing the said substance, as 103 grams and it's value being estimated at Rs.1,50,000/-. Samples were drawn from the same and the said substance was seized.

7 Section 42 of the NDPS Act prescribe the power of entry, search, seizure and arrest, and it specifically enumerate the Officers who are empowered to exercise the said power. Section 42 envisage that any such Officer (being an officer superior in rank to a peon, sepoy or constable), apart from the other department, the Police Department of the State Government is empowered to take search of the person under the Act, in exercise of powers conferred by sub-section (1) of Section 42 of the NDPS Act.

The Government of Maharashtra has issued a circular on 14/11/1985, prescribing that all Officers of, and above the ranking of Head Constables in the State of Maharashtra are permitted to take search u/s.42. The said circular categorically designate the Police Officers of, and above the ranking of Head Constables, as competent Officers who are empowered to exercise the powers under sub-section (1) of Section 42 i.e. of

search and seizure.

Admittedly, from the panchnama, it is apparent that the API directed the Police Naik to carry out the search, and it is he who carried the personal search of the applicant, which lead to the recovery of Mephedrone. Since the Police Naik is below the rank of Head Constable in the State of Maharashtra, he is not an empowered Officer and though the search is carried out in presence of the API, it is not a valid search.

. In Dilkush Sinai vs. State of Goa, 1995(2), Goa.L.T., where the PSI himself did not search the accused, but directed the two panch witnesses to conduct the search, the question that arose for consideration before the Division Bench was whether the search by panchas in presence of PSI, was legal one and if not, whether the trial would be vitiated on account of the fact that the search was illegal. The Division Bench of this Court, held as under :-

“15. We have therefore no hesitation in upholding the submission of the learned counsel for the appellant on this aspect of the case. We hold that the search was effected by a person unauthorised to effect the search under the law. We hold that the trial of the accused was vitiated as a result of the said unauthorised illegal search. It must be stated in the passing that on this aspect of the case the learned counsel for the appellant also relied on the observations made by the Division Bench of this Court in the case of **Ramchandra Tolaram Khatri and another v. The State** reported in AIR 1956 Bombay 287.

In this case, it was held by the Court that merely because the police took the panchas with themselves before the raid, the panchas do not become members of the raiding party and cannot be looked upon as partisan witnesses”.

8 The Division Bench in case of Rolf Michael (*supra*) made reference to the notification authorizing the officers of the Police Department in the State of Goa, in exercise of power conferred u/s.42 of the NDPS Act and the notification dated 11/2/1986, authorized all Officers not below the rank of Assistant Sub Inspector of Police in the Police Department.

Dealing with the situation where the search was carried out by the Head Constable one Mr.Mayekar, though in presence of PSI, the Division Bench arrived at the following conclusion.

“15 We, therefore, have no hesitation in holding that the search by Mayekar, the Head Constable, was unauthorized since he was not empowered to conduct the search under Section 42 of the Narcotic Drugs And Psychotropic Substances Act and consequently the search was illegal. Since the search was illegal, the trial was vitiated and conviction based on such trial cannot be sustained and has to be set aside, which we hereby do. In view of our finding on this point, we think it unnecessary to go into the other aspects canvassed by the learned Senior Counsel appearing for the accused”

With the aforesaid observation, the Criminal Appeal was allowed and the judgment and order of conviction and sentence passed by the Special Judge, came to be set aside.

.. Since, there is no dispute about the factual aspect before me by applying the legal position to the effect that the search is carried out by an unauthorized officer, I am prima facie satisfied that there are reasonable grounds for believing that the search being illegal, and the applicant is not guilty of the offence and in absence of any antecedents being attributed to him, he is not likely to commit the offence in future.

Recording that there is a clear breach of Section 42(1) of the NDPS Act, the applicant deserve his release on bail. Hence, the following order :-

ORDER

- (a) The Applicant - Haji Mohd. Abdul Kadar Bhumedia in connection with C.R.No.988/2020 registered with Kashmir Police Station shall be released on bail on furnishing P.R. bond to the extent of Rs.50,000/- with one or two sureties of the like amount.
- (b) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case so as to dissuade him from disclosing the facts to Court or any Police

Officer. The Applicant should not tamper with evidence.

- (c) The Applicant shall report to the police station on first Monday of every month, till framing of the charge and attend the trial on regular basis.

The Application is allowed in the aforestated terms.

(SMT. BHARATI DANGRE, J.)