

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.1801 OF 2021

Nadeem Abdul Rahim Choughule .. Applicant

Versus

The State of Maharashtra .. Respondent

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Mr.Ayaz Khan i/b Mr.Rajendra Bidkar for the Applicant.

Mr.S.V.Gavand, A.P.P. for the State/Respondent.

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CORAM: BHARATI DANGRE, J.

DATED : 14th SEPTEMBER, 2022

P.C:-

1. Heard learned counsel for the applicant and the learned A.P.P. for the State.
2. The applicant is charged under Sections 8(C), 20(C) and 29 of the NDPS Act and in connection with the subject C.R., he was arrested 06/10/2020.
3. The case of the prosecution is, on 05/10/2020, the Officers of the Human Trafficking Cell, while on patrolling duty in Mira Bhayander Ward, saw some persons with a suspicious movement and two of them were sitting on black motorcycle while other two were on Suzuki Aactiva Scooty. Noting their suspicious behaviour, API Handore apprehended three accused persons at 21.45 hrs, however, one of the accused fled away on black motorcycle.

The procedure that was carried out while searching the persons, who were apprehended and which include the present applicant, who was carrying a red colour cloth bag in his hand, is recorded in the panchnama. It record the happening of events from 21.45 hrs. till 03.10 hrs. of 06/10/2020. The panchnama bears the signature of API Devidas Handore, ANC Unit and two panchas, Mojim Abdullah Shaikh and Rahul Zhunjare have also signed the panchnama. The panchnama specifically records that Police Constable 2269, on instructions of API Devidas Handore, carried out the personal search of the applicant, who was carrying the cloth bag in his left hand. On opening the said bag, a packet was revealed and the panchnama specifically detailed out the procedure, which was followed for removing the substance from the said packet and testing it, so as to derive a conclusion that the said substance is a contraband. Panchnama further record the manner in which the samples were drawn and the seizure of the recovered contraband.

4. What is conspicuously absent in the said panchnama is the compliance of Section 50 of the NDPS Act, either in form of an attempt to carry out the search before the Gazetted Officer or the Magistrate or even apprising the person, whose search was to be carried out about the right available to him, to request for the search being carried out in the manner prescribed under Section 50 of the Act. Imperative mandate of Section 50 serve a dual purpose i.e. to protect the person against a false accusation and frivolous charge and also to lend credibility to the search and seizure. The position of law as regards the importance and the imperative nature of seizure

to be carried out in the manner prescribed under Section 50 has been put to rest by the Constitution Bench decision in the case of *State of Punjab Vs. Baldev Singh*¹ and it has been held to be an imperative mandate to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or to the nearest Magistrate for effecting his search. Though the information may not be necessarily in writing, it has been held that failure to inform the person concerned about the existence of a right to be searched in the presence of the Gazetted Officer or the Magistrate would cause serious prejudice to him. Though it has been held that it will not render the recovery of the illicit article suspicious and vitiate the conviction and sentence of an accused, it would be construed as violation of the mandatory condition imposed under Section 50.

5. On perusal of the complaint lodged on 06/10/2020 and the panchnama, it can be seen that the said safeguard contemplated under Section 50 has not been adhered to at all. The statements of two panchas as well as the statement of police constable Keshav Nivrutti Shinde, who was present, are also conspicuously silent about the said procedure being followed, which is in form of a statutory mandate. Surprisingly, at page 104, a notice under Section 50 is placed on record in an attempt to demonstrate that the applicant was apprised of the right available to him. When the said letter, allegedly to be issued to the applicant during the course of search is carefully perused, it is stated that he is informed that he has right to be searched in presence of the Magistrate or

1 AIR 1999 SC 2378

Gazetted Officer and, therefore, he should disclose the name of such an Officer or the Magistrate alongwith his address so that search can be arranged. Similar such intimation to other two accused persons are placed on record and it can be seen that the said communications are at variance, as the intimation given to accused Dawood Ansari intimates that he has a right to seek his search by the Gazetted Officer or the Magistrate located nearby, and arrangement to that effect can be done.

When the communication is perused, *prima facie*, it appears to be an after thought attempt as it does not bear the signatures of the panchas and in the statements of the two panchas, compiled in the charge-sheet, there is no mention of such an intimation given to the accused persons.

6. The entire purpose of the statutory mandate contemplated under Section 50 is well settled by this time and what could be the impact of it's non-adherence would be determined at the time of trial. However, while considering the application of the applicant for being released on bail, the Court has to be satisfied about the existence of reasonable ground that he is not guilty of such offence and he is not likely to commit any offence, while on bail. The non-adherence of the imperative mandate and an attempt on part of the prosecution to improvise it's case by compiling the documents, without the signatures of the panchas, make me to believe that there are no reasonable grounds to hold that the applicant is guilty of offence. Further, in absence of any antecedents, I have reasonable ground to believe that there is no likelihood of committing the offence, while being released on bail.

Hence, the applicant is entitled to be released on bail.

7. Needless to state that the observations made above are, *prima facie*, in nature and limited to the extent of adjudication of the present application and the learned Judge trying the applicant for the offences with which he is charged, shall not get influenced by the above observations, in any manner.

: ORDER :

- (a) Application is allowed.
- (b) Applicant -Nadeem Abdul Rahim Choughule shall be released on bail in connection with C.R.No.0226 of 2020 registered with Mira Road Police Station on furnishing P.R. Bond to the extent of Rs.50,000/- with one or more sureties in the like amount.
- (c) The applicant shall mark his attendance before the concerned police station on first Monday of every month between 10.00 a.m. to 12.00 noon till framing of charge, and, thereafter abide by the directions issued by the trial Court.
- (d) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any Police Officer. The applicant shall not tamper with evidence.
- (e) On being released on bail, the applicant shall furnish his contact number and residential address to the Investigating Officer and shall keep him updated, in the event of any change therein.

(SMT. BHARATI DANGRE, J.)