

rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.3337 OF 2021

Sanobar Shafiq Khotal	]	..	Applicant
vs.			
State of Maharashtra	]	..	Respondent

Mr.Ayaz Khan a/w Dilip Mishra for the Applicant.
Mr.S.H. Yadav, APP for the State.
API Y.T. Kakad, Unit I Thane present.

CORAM : BHARATI DANGRE, J

DATE : 14th OCTOBER, 2022.

P.C.

1] The Applicant who is charged for the offences under Section 8(c), 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 in CR No.I-15/2021, seek his release on bail on ground that investigation is complete and charge-sheet is filed on 21.07.2021 and there is no reason why the Applicant should remain incarcerated.

2] Heard the learned counsel for the Applicant and the learned APP for the State.

3] The learned counsel for the Applicant would assertively submit that on perusal of the charge-sheet it is very apparent that there is clear infraction of Section 42 of the NDPS Act and he would place reliance upon an order passed by this Court in the case of Rajaram Kadu vs.

State of Maharashtra (Bail Application No.2108/2016) to buttress his submission that Section 42 of the NDPS Act which contemplates that the person who has received the information, himself must forward it to his superior and any non-adherence to the said stipulation would be fatal to the prosecution case.

Reliance is also placed on the decision of the Apex Court in the case of ***Sarija Banu Janarthani vs. State through Inspector of Police, (2004) 12 SCC 266.***

In contrast, the learned APP would submit that the said submission is without any basis and it is a matter of trial. However, considering the seriousness of accusation, the Applicant do not deserve the relief prayed for.

4] The prosecution case which has featured through the charge-sheet is that on 18.01.2021 the complainant was on duty from 9 hours onwards. Sr. PI Nitin Thakare informed the complainant that PI Krishna Kokani has received secret information that the Applicant alongwith two associates is likely to arrive Honeycomb Bar, Service Road, below bridge, Thane, to sell mephedrone in a white Mahindra car. The complainant, thereafter, advanced a copy of information registered alongwith his report to the office of Assistant Commissioner of Police , Crime Branch, seeking permission to conduct further proceedings.

Upon receipt of the permission, Sr. PI Nitin Thakare proceeded with the action. The information was conveyed to the concerned police department of ANC after effecting necessary entry in the station diary. The raiding party proceeded and reached the spot and a trap was led around 17.24 hours. At around 17.35 one white colour Mahindra car arrived in front of Honeycomb Bar and one person sitting was found

besides driver and a women was sitting on the back seat of the car. The prosecution allege that the Applicant and her two other associates got down from the vehicle and started proceeding towards Rabodi and they were accosted at 17.40 hours by the raiding team. After intimating them of their right under Section 50 of the NDPS Act, the letter scribed in Marathi was issued to the Applicant and her two associates, informing their right under Section 50 of the NDPS Act.

The Applicant and her associates offered to be searched by the officers of the raiding team.

The Applicant being a women was taken to traffic control office of Kapurbawdi area and search was conducted which led to a white colour powder in plastic bag from the purse of the Applicant.

It was opened, tested, smelled and touched and it was confirmed that the substance was mephedrone powder. IT was weighed on the weighing scale and found to be 90 grams. Two samples of two grams each from the said power was obtained and remaining substance was kept in a khaki wrapper. The two samples were closed by affixed label of signatures. Nothing incriminating was found from the two male persons accompanying the Applicant.

5] The complaint was lodged against the applicant and her two associates in form of CR NO.I-15/2021 at the instance of and the applicant came to be arrested.

The learned counsel had invited my attention to sub section (2) of Section 42 of the Act which deal with the power of entry, search, seizure, and arrest without warrant or authorisation and it is submitted that the compliance of the said procedure is imperative as the power is conferred on the Officer described in the said section to effect to enter into and search in building, seize any contraband substance which he

has reason to believe is liable for confiscation and immediate officer to detain and search any person who he has reason to believe that he has committed any offence punishable under the Act.

Sub-section (2) of Section 42 of the Act reads thus :

“Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the provision thereto, he shall within seventy-two hours send a copy thereof to his immediate superior.”

6] Submission advanced is, when search is made by the Police Officer or concerned Authority upon prior information received and in this situation adherence to sub-section (2) becomes imperative.

By inviting my attention to the prosecution case, Mr. Khan would submit that as per the FIR lodged by Police Head Constable Ravindra Katkar, Krishna Kokane received information from his informer about the persons arriving at the given spot for sale of drug. He has invited my attention to entry in station diary about the information received. The person receiving information is shown as PI Krishna Kokane, Crime Branch and Sr. PI Nitin Thakare has signed as “in presence”.

7] The details of information received are recorded as under :

“Women named Sanobar Khotal being in possession of mephedrone power is likely to arrive in front of Honeycomb Bar on service road under the bridge for sell of said powder in Thane city. She is accompanied by her associates and arriving in white colour Mahindra car.

Mr. Khan has invited my attention to the information he has transmitted to the ACP not by Krishna Kokane, but by Sr. PI Nitin Thakare by mentioning that the same information is received from the informer of Krishna Kokane. The details of information forwarded reads

thus :

Today, at around 17.30 to 18.00 hours, women named Sanobar resident of Chinchbunder, Mumbai, aged 37 years, fair complexion, height 5 ft. is likely to arrive for sale of mephedrone, Narcotic drug in her possession, in front of Honeycomb Bar below Service Road bridge Thane (E) in white colour Mahindra car.

8] Mr. Khan would seek to derive benefit of the inconsistency in the two versions by submitting that in the information received by Krishna Kokane, the age description of the woman as well as her residential address is conspicuously absent. Apart from this, Mr. Khan would submit that the information undisputedly is received by Krishna Kokane from his informer who has transmitted it to Sr. PI Nitin Thakare, but as per mandate of sub Section 2 of Section 42, Officer who takes down the information in hand-writing shall within 72 hours sent a copy thereof to his immediate superior. Admittedly, in the present case, information is reduced into writing by Krishna Kokane, but instead of forwarding the very same information to his superior, as contemplated under sub-section (2), the information is forwarded by Sr. PI Thakare, who has not recorded the information received. Apart from this, the information received differ from the information transmitted by Sr. PI Nitin Thakare to his superior by inserting description of the Applicant which was not received, apparently not received from the secret informer and therefore not mentioned while the information was recorded by Krishna Kokane.

9] The emphasis of learned counsel Mr. Khan is upon the wording applied in sub-section (2) of Section 42, "send a copy thereof".

I find substance in the said submission.

The Hon'ble Apex Court in the case of **Sarija Banu Janarthani** (*supra*) for compliance of Section 42 is mandatory and if this fact is brought to the notice of the court while considering the Bail Application, it must be given due weightage. The learned counsel has rightly placed reliance upon observations made by this Court in the order (*supra*) to the following effect :

“The point which is canvassed by learned counsel for the Applicant is that the person who had received the information had not forwarded it to the superior officer and there is nothing on record to indicate that any such information was forwarded in writing.”

.. In the wake of above observations, the application came to be allowed.

10] Apart from this, Mr Khan has also invited my attention to further discrepancy in the case of prosecution as regards seizure and forwarding of the substance for analysis. He would submit that if the first information report is carefully perused, when the applicant is alleged to have stepped out of the vehicle alongwith her two associates, she is not seen with a purse in her hand, but when she is forwarded for search by taking her into a room, the purse had suddenly appeared and contraband is alleged to have contained in the said purse.

11] Apart from this, MR. Khan would submit that the Panchanama and complaint would reveal that out of 90 Grams mephedrone powder which was recovered from the purse of the applicant, two samples of two grams each were drawn and separately kept in plastic bags which were packed into brown colour envelope and seal was affixed to it.

The samples were identified as A1 and A2 and bulk was identified as A.

His emphasis is on drawing of two samples of two gram each. He would then invite my attention to the proceedings before the Magistrate under Section 52A where bulk of the contraband is described to be 86 grams. A certificate issued under Section 52A of the NDPS Act issued by the Judicial Magistrate, however, depict something else and my attention is invited to the said portion.

“I personally verified all the inventory produced before me I have been satisfied that the above inventory panchnama has been done in report of Mafedrone powder 90 g. Out of this 85 g.m of Mafedrone powder as per submission of police officer One Samples of 2.00 gm each Exhibit A1 is sent for Chemical Analyser and One samples of 2.00 gm is kept for sample. Today Mafedrone powder with Pouch is produced before as Exhibit A and Exhibit A-2./The consignment of the seized goods related to the case presented before me to certify the correctness of the above inventory./After verification and taking proper weight it is found that sample 'A' contains mafedrone bearing total wright of 85.00 gm and Sample 'A 2' contains mafedrone bearing total weight of 2.00 gm. There after the both samples have been sealed before me. After measurement of sealed envelopes and open muddemal are clicked before me./ Photographs are also certified by me. Muddemal is properly sealed before me. After verification empty envelops are also sealed in muddemal envelop.”

12] Further submission is that when what was forwarded for analysis by letter dated 09.01.2021 is not in sync with the search and seizure and as there is reference to recovery of 91 grams of white crystal powder known as Mephedrone and what was forwarded in packed Ex.A is 90 Gram crystal powder packed in transparent plastic bag. This inconsistency is emphasized upon by the learned counsel and he would submit that if this goes to the root of the matter, and the Applicant

deserve to be released on bail as if at the end of trial, she is acquitted of the charges on the technical ground and lacuna in the prosecution case, incarceration cannot be compensated in terms of money.

I am persuaded to accept the submission of Mr. Khan by specifically referring to Section 42(2) of the NDPS Act which contains statutory mandate as to what information is received shall be transmitted and I have no hesitancy in recording that there is clear infraction of the said provision .

Apart from this, one who receives information must forward it to the superior. Even here, the prosecution case is flawed.

Apart from this, there is inconsistency in the prosecution case as regards seizure of sample and what was forwarded for analysis and the inconsistency which has featured through the various communications/ correspondence makes the Applicant entitled for benefit of doubt. Therefore, she deserve to be released on bail.

14] The observations made above are prima facie in nature and limited for the purpose of determination of the present Application and the learned Judge trying the Applicant for the offences, with which he is charged, shall not in any manner be influenced by the above order.

Hence, the following order :

ORDER

- (a) Application is allowed.
- (b) Applicant – Sanobar Shafiq Khotal shall be released on bail in connection with C.R.No.I-15/2021 registered with Rabodi Police Station on furnishing P.R. bond to the extent of Rs.25,000/- with one or two sureties of the like amount.

The Applicant be released on cash bail for a period of six weeks. During the said period he shall arrange for

sureties.

(c) The applicant shall report to the concerned Police Station on first Monday of every trimester between 10.00 a.m. to 12.00 noon.

(d) 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 and should not tamper with evidence.

(f) The Applicant shall regularly attend trial, on every date, unless exempted.

[BHARATI DANGRE, J]