

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO. 303 OF 2023**

Jabir Nader Ali	.. Applicant
Versus	
The State of Maharashtra	.. Respondent

...

Ms.Anjali Patil with Ms.Mallika Sharma for the applicant.
Mr.S.R. Agarkar, APP for the State.

**CORAM: BHARATI DANGRE, J.
DATED : 4th DECEMBER, 2023**

P.C:-

1 The applicant face charge under Section 8(c) and Section 22(c) of the Narcotic Drug and Psychotropic Substances, Act, 1985 (for short NDPS Act). He came to be arrested on 19/2/2020 in connection with the C.R registered with Dongri police station, and upon completion of investigation, charge-sheet has been filed against him on 14/8/2020.

 Since the applicant continue to be incarcerated with no progress in the trial and on his first application, having been withdrawn on 5/8/2022, the present application is filed.

2 Heard Advocate Ms.Anjali Patil with Ms. Mallika Sharma for the applicant and Shri S.R. Agarkar, learned APP for the State.

Ms.Patil has pressed into service the long period of incarceration of the applicant, with no progress in the trial and she would place reliance upon the position of law, as regards the non-compliance of Section 52A of the NDPS Act, to submit that non-compliance is likely to prove fatal to the prosecution as the procedure prescribed therein was not followed in drawing samples and seizure of the alleged narcotic drug and therefore, it raises a serious doubt about the correctness of samples sent for analysis.

Ms.Patil has placed reliance upon the judgment of the Apex Court in case of (i) *Union of India Vs. Mohan Lal and Anr*¹, (ii) *Yusuf @ Asif Vs. State*² and also the decision in case of *Simarnjit Singh Vs. State of Punjab*³. She has also relied upon the decision of this Court in case of *Shivraj Gorakh Satpute Vs. State of Maharashtra* (BA 2865/2022), relying upon Simranjit Singh, to bolster her submission that the applicant deserve his release on bail in the wake of non-compliance of Section 52A.

The learned APP Mr. Agarkar has, however, relied upon the decision in case of *Mohammad Maqbool Abdul Gafar Bhat Vs. State of Maharashtra*⁴ and in case of *Mukesh Rajaram Choudhari Vs. The State of Maharashtra*⁵ (BA No.54/2023), to

1 Cr.Appeal No. 652/2012

2 Cr.Appeal No.3191/2023

3 2023 LiveLaw (SC) 570

4 BA No. 1804/2023

5 BA No. 54/2023

submit that the violation of Section 52A cannot be the sole consideration, where the accused automatically becomes entitled to bail as a matter of right and the rigors of Section 37 of the NDPS Act would still continue to apply.

3 It is the case of the prosecution that on 18/2/2020 when the police team was patrolling near Joggers Park, Carter Road, Bandra, they noticed a person with suspicious movements holding a black colour plastic bag in his right hand and waiting for someone. When he was approached, he attempted to flee away, but was detained and when asked the cause for his act, he informed that since he was carrying LSD papers and Ecstasy tablets, he feared arrest.

The panchas were summoned and a search was carried out by following the procedure and apprising him about his right u/s.50 of the NDPS Act, but since it was declined by the person detained, further procedure was carried out. The plastic bag was found to have contained 12 LSD papers, which were weighed on the electric weighing scale and they were tested by using the Drug Testing Kit.

On carrying out the necessary test, it was found that the substance is Lysergic Acid which is popularly known as 'LSD paper'. The LSD Dot papers were weighed on electronic weighing machine and was recorded as 2.51 gms. The LSD Dot papers were thereafter send for Chemical Analysis. The seized material was stamped and sealed by the office brass seal and was

marked as 'A'. Samples were drawn from the Ecstasy pills which were found to be weighing 37.70 gms.

The total valuation of the seized material was approximated to be Rs.5,20,000/-.

4 It is the case of the applicant that he is falsely implicated and the case of the prosecution appear to be doubtful, as it is their version that they found one person, wandering suspiciously, and there was no basis of this suspicion according to the applicant. The incident is alleged to have taken place on 19/2/2020 as the panchnama record the time as 2.15 a.m on 19/2/2020, whereas as per the applicant, the notice u/s.50 reflect the date as '18/2/2020' and therefore, the recovery is doubtful.

On completion of investigation, it is contended that the charge-sheet having been filed, there is no reason why he should remain incarcerated, since he his inside the prison since February 2020, and is on the verge of completion of four years of incarceration.

5 Section 52A inserted in the NDPS Act, provide for disposal of seized Narcotic Drug and Psychotropic Substance and the Hon'ble Apex Court in case of Union of India Vs. Mohan Lal (supra) has extensively dealt with the said provision and it is clearly held that what is manifest from reading of Section 52A(2) (c) is that, upon seizure of the contraband, the same is to be forwarded either to the Officer-in-charge of the nearest police station, or to the Officer empowered u/s.53, who shall prepare an

inventory, as stipulated in the provision and make an application to the Magistrate for the purposes of (a) certifying the correctness of the inventory and certifying photographs of such drugs, or substances taken before the Magistrate as true, and (b) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

6 Sub-section (3) of Section 52A further contemplate that the Magistrate shall, as soon as may be, allow the application.

7 The position of law which emanates from the decision in case of Mohan Lal, clearly contemplate that the process of drawing sample has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

Referring to the amended Section 52A providing for the disposal of the seized contraband in the manner stipulated, reference is made to a notification dated 16/1/2015, which in supersession of the earlier notification is held not only to stipulate that all drugs and psychotropic substances have to be disposed off, but also to be identified by the Officers, who shall initiate action for its disposal and the procedure to be followed for such disposal.

Upon a detail discussion on the procedural aspect, the Apex Court in case of Mohan Lal has concluded as under:-

“20 To sum up we direct as under :-

(1) No sooner the seizure of any Narcotic Drugs and Psychotropic and controlled substances and Conveyances is effected, the same shall be forwarded to the officer-in-charge of

the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52A(ii) of the Act, which shall be allowed by the Magistrate as soon as may be required under Sub-Section 3 of Section 52A, as discussed by us in the body of this judgment under the heading 'seizure and sampling'. The sampling shall be done under the supervision of the Magistrate as discussed in paras 13 and 14 of this order.

(2) The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized Narcotic Drugs and Psychotropic and controlled substances and Conveyances duly equipped with vaults and double locking system to prevent theft, pilferage or replacement of the seized drugs.

(3) The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.

(4) Disposal of the seized drugs currently lying in the police maalkhans and other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of the judgment under the heading 'disposal of drugs'."

8 The NDPS Act, on account of its gravity and inclusion of provision for deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances, necessarily warrant stricter compliance of the provisions, and it has been the consistent view of the Courts, all along.

 Upon the interpretation derived from reading of Section 52A and in particular, sub-Section (2), which is couched in a mandatory language by use of the word 'shall', it is imperative that the process of drawing sample has to be in presence and

under the supervision of the Magistrate and the entire exercise shall be certified by him to be correct, and by specifically observing that there is no provision in the Act that mandates the taking off sample at the time of seizure, in Mohan Lal, it is categorically held that the samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52A constitute primary evidence for the purpose of trial.

The consequence which follow is, if there is no compliance, then samples seized and tested shall not amount to primary evidence, as is observed in case of Yusuf @ Asif (supra). In the backdrop of the arguments advanced that the entire action of seizure and sampling is illegal as it is done in violation of mandatory provisions of Section 52A of the NDPS Act, as the procedure prescribed therein was not followed in drawing the samples and seizing the alleged narcotic drug, an argument was advanced that a serious doubt is raised about the correctness of the samples sent for analysis, as to whether they are actually the samples of the seized contraband.

9 On reproducing Section 52A and by referring to it's purport and with the reference to the case in Mohan Lal, the Apex Court has considered the admitted position that the samples from the seized substance were drawn by Police in presence of the Gazetted Officer and not in the presence of the Magistrate. Referring to the decision in case of Mohan Lal, it is held that the samples drawn in the presence of Magistrate alone, and the list

thereof on being certified, would constitute primary evidence for the purpose of trial and the pertinent observations read thus :

“16 In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate. It is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.

17 Accordingly, we are of the opinion that the failure of the concerned authorities to lead primary evidence vitiates the conviction and as such in our opinion, the conviction of the appellant deserves to be set aside. The impugned judgment and order of the High Court as well as the trial Court convicting the appellant and sentencing him to rigorous imprisonment of 10 years with fine of Rs.1 lakhs and in default of payment of fine to undergo further imprisonment of one year is hereby set aside.

18 The appellant has already undergone more than 6 years of imprisonment out of 10 years awarded to him. He is on bail and has been granted exemption from surrender by this Court. Therefore, his bail bonds, if any, stands cancelled.”

10 In case of Simranjit, once again, by relying upon paragraph nos.15 to 17 of the decision in case of Mohan Lal, since the drawing of samples from the packets at the time of seizure was found not in conformity with the law laid down in case of Mohan Lal, it was held that it has created a serious doubt about the prosecution case that the substance recovered was contraband and holding that the prosecution has failed to prove its case beyond reasonable doubt, the impugned judgment of conviction and sentence was set aside by allowing the Appeal.

11 Though Mr. Agarkar would rely upon the decision of the learned Single Judge in case of Mukesh Chaudhary, which has noted Simaranjit Singh, it was expressed that there is nothing which prohibits the Investigating Agency from drawing the samples in the presence of the Magistrate, even at this point of time, if the goods have not been destroyed and then the only question that would arise is why the steps are taken at belated stage.

My attention is invited to an Inventory Panchnama dated 3/3/2022 drawn more than two years after the contraband was seized, and it is nothing but an attempt to fill up the lacunae by non-adhering to the procedure prescribed u/s.52A and what is worth to note is the utter casual approach in carrying out the process, as in the Inventory Panchnama, what is put to test is Exhibit-B i.e. Ecstasy tablets which have been weighed and this procedure is not adopted in respect of Exhibit-A, the alleged seized contain the LSD blots.

The Metropolitan Magistrate has issued a certification but which is restricted only on the production of Ecstasy tablet contained in Exhibit-B and not as regards the LSD, and therefore, even this process, in an attempt to fill up the lacunae by the prosecution is not faithful and beyond doubt.

12 In the present case, Ms.Patil has pointed out that the alleged contraband has been forwarded for its Chemical Analysis

in February 2020 and the examination report is received on 15/10/2020 and the arrest of the applicant and his involvement in the subject C.R is based on the said report, when the contraband was seized and the samples drawn on the spot with no compliance of Section 52A. It is this seizure in absence of following the procedure under Section 52A, which cannot be considered as the valid piece of primary evidence and even at the end of the trial, in absence of primary evidence being made available, the trial shall stand vitiated and this is what has been specifically concluded in case of Yusuf @ Asif.

In the two decisions cited before me by Ms.Patil, on culmination of a trial, when in absence of the procedure prescribed u/s.52A(2) having not been followed, the act of drawing samples and it having been analysed and found to be a contraband or prohibited substance, has resulted in reversing of the conviction as the case of the prosecution was doubtful.

13 In the wake of the above decisions and the dictum flowing from the Apex Court in case of Yusuf as also in case of Simranjit Singh, and since the seizure of the contraband would inspire confidence, as it forms the soul of the accusation under NDPS Act, having been satisfied that there are reasonable grounds for believing that the applicant is not guilty of the offence with which he is charged, and in absence of any antecedents that he is not likely to commit any offence while on bail, I deem it appropriate to secure his liberty as, in any case,

despite his arrest for last three years and eight months, till date, even charge is not framed.

The balance will have to be definitely struck between the interest of the accused and the deterrent punishments provided under NDPS Act and in an attempt to do so, I am of the view that non-compliance of Section 52A within a reasonable time, give rise to an apprehension that the sample which is alleged to have been drawn and send for analysis, could have been tampered and in absence of certification from the Magistrate, the sample has been correctly drawn and the benefit of doubt must necessarily yield in favour of the applicant. Ultimately, it will be for the prosecution to establish at the time of the trial in absence of the certification from the Magistrate, the genuineness of the procedure followed and that the sample was not susceptible of any tampering during the process.

14 I feel myself bound by the decision of the Apex Court as in the present case, the procedure is carried out after more than two years, when an attempt is made to cure the defect by drawing the sample in presence of the Magistrate, and that too only in respect of the ecstasy tablets and not for LSD, but it shall not amount to curing the violation of Section 52A (2).

Considering the fact that the applicant is of young age, being 29 years, he deserve his release on bail, pending the trial.

In the wake of the above, the applicant is entitled to bail which shall be subject to the following conditions :

ORDER

- (i) The applicant Jabir Nader Ali, who is facing trial in C.R.No. 05/2020 registered at the instance of DCB CID Unit III, is ordered to be released on cash bail in the sum of Rs.50,000/- for a period of four weeks.
- (ii) The applicant shall, within the said period of four weeks, furnish P.R bonds in the sum of Rs.50,000/- with one or two solvent sureties in the like amount.
- (iii) The applicant shall report to concerned police station, once in three months on 1st Monday of the month between 11.00 am to 2.00 p.m till framing of the charge.
- (iv) The applicant shall not interfere with the prosecution witnesses and shall not tamper with the evidence or attempt to influence or contact the complainant, witnesses or any person concerned with the case in any manner;
- (v) The applicant shall keep the trial Court informed of his current address and mobile contact number and/or change of residence or mobile details, if any, from time to time.
- (vi) The applicant shall co-operate in the conduct of the trial and attend the trial Court on all dates, from time to time.

(SMT. BHARATI DANGRE, J.)