

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO.565/2022

DIKSHA
DINESH
RANE

Digitally signed by
DIKSHA DINESH
RANE
Date: 2023.03.03
18:51:39 +0530

HITESH TATYARAO KALE

..APPLICANT

VS.

THE STATE OF MAHARASHTRA

..RESPONDENT

Adv. Ayaz Khan for the applicant a/w. Adv. Dilip Mishra, Adv.
Zehra Charania for the applicant.

Ms. A. A. Takalkar, APP for State.

HC S. N. Shendge, Crime Branch, Navi Mumbai.

CORAM : M. S. KARNIK, J.

DATE : FEBRUARY 16, 2023.

P.C. :

1. This is an application for bail in respect of First Information Report (FIR) No.124/2021 registered with the CBD Belapur Police Station, under Sections 8(c), 22 (c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter "NDPS Act", for short) dated June 23, 2021.

2. The date of the incident is June 22, 2021. On information, the raid was conducted by Crime Branch, Navi Mumbai. There are three accused in all. The accused no.3 has been released on bail. The applicant is the accused no.2. The applicant was pillion rider with the accused no.1

who was found with the contraband. The accused no.1 was riding a scooty. There was a recovery of 125 LSD blots from the accused no.1 which is a commercial quantity. No narcotic substance was recovered from the applicant.

3. The applicant is in custody for more than one year and nine months. The charge has not been framed. The trial is not likely to commence and conclude any time soon. There are no criminal antecedents reported against the applicant.

4. Learned counsel for the applicant submitted that there is no compliance of Section 42 of the NDPS Act. According to learned counsel for the applicant, the information sent under Section 42(2) of the NDPS Act is different from the one reduced into writing under Section 42(1) of the NDPS Act. It is submitted that the officer who has reduced the information into writing is Police Naik 2833 whereas the officer who has complied under Section 42(2) of the NDPS Act is Assistant Police Inspector. It is further submitted that there is a violation of Section 50 of the NDPS Act. According to learned counsel for the applicant, the panchanama reflects that the accused was informed that the member of the raiding party is a Gazetted Officer.

5. Learned APP submitted that the applicant has to be regarded as in conscious possession of the contraband. The accused no.1 and the applicant were dealing in drugs for several years. The statement of the witness Vineet Sunil Chandran is relied upon by learned APP. Learned APP submitted that the statement would indicate that the present applicant had complete knowledge about the possession of the contraband with the accused no.1 and that they were together dealing in the sale of the substance. Relying on **Union of India through Narcotics Control Bureau vs. Md. Nawaz Khan**¹, learned APP submitted that mere absence of possession of the contraband on the person of the accused does not *ipso facto* mean that the accused was not in “conscious possession” of the contraband. According to him, the knowledge of possession of the contraband has to be gleaned from the facts and circumstances of a case.

6. Heard.

7. So far as the contention regarding breach of Section 50 of the NDPS Act is concerned, the panchanama dated

¹ (2021) 10 SCC 100

June 22, 2021 clearly reveals that the officer of the raiding party had informed the applicant that he was Gazetted Officer and he has a right to carry out search. However, he apprised the applicant of his right to be searched in the presence of a Gazetted Officer or a Magistrate.

8. The Division Bench decision of this Court in the case of **Dharmaveer Lekhram Sharma vs. State of Maharashtra²**, in paragraphs 7, 8 and 9 observe thus:-

“7. The main contention raised by Mr. A.P. Mundargi, the learned Counsel for the appellants is that the conviction and sentence of Accused Nos. 1 and 2 cannot be sustained since there has been no compliance with the provision of section 50 of the N.D.P.S. Act. It was pointed out that while Accused Nos. 1 to 4 were apprised of their legal rights regarding search, as contemplated under section 50 of the N.D.P.S. Act, the officers of the raiding party also informed them that the concerned officers were Gazetted Officers. On such information, it was argued, that the accused persons declined to be searched from the Gazetted Officers or the nearest Magistrate.

To substantiate this argument, our attention was invited to the testimony of P.W. 1 Mehta as well as P.W. 5 Surya, who were Inspectors of Police and Gazetted Officers in the raiding party. P.W. 1 Mehta has stated that they informed the accused persons that they were being searched for the suspected narcotics and P.I. Surya also gave them

² 2001(5) BCR 9

understanding that they had right to be searched in the presence of the Gazetted Officers or Magistrate if they so desired. P.I. Surya further told them that he himself as well as P.W. 1 Mehta were the Gazetted Officers. Thereupon all the four accused persons declined the offer.

Similar is the version put forth by P.W. 5 Surya in this regard. According to him, after apprising the accused persons of their rights to be searched from Gazetted Officers or nearest Magistrate, they were given to understand that P.W. 1-Mehta as well as himself P.W. 5-Surya present on the spot were also Gazetted Officers. Same version appears in the panchanama Ex. 33A, though it is not proved in the strict sense of the term. It was, therefore, urged that the right of the accused enshrined under section 50 of the N.D.P.S. Act contemplates offer of search from a Gazetted Officer who is not part and parcel of the raiding party which is subjecting the accused for the search at the relevant time, but should be independent of such authority. In support of this argument, the learned Advocate for the appellants sought to rely upon the ruling of our High Court in the case of Mohanlal Khetaram Jangid v. State of Maharashtra, 1998(1) L.J. 405, wherein it is observed thus :

"(c) The object of section 50 is clear. It intends to ensure that search, if so required by the accused, should be taken in front of an independent and a responsible officer. This independent and responsible officer in section 50 has been mentioned as either a Gazetted Officer or a Magistrate. Even though the raiding party could be accompanied by a Gazetted officer, surely such a Gazetted officer would not be an independent or responsible officer contemplated by section 50, as he cannot be considered to be an

independent officer. Hence, when the accused is informed that he will be searched in the presence of a Gazetted officer who is a member of the raiding party, same will not amount to compliance with the provisions of section 50."

8. Therefore, in our considered view, the search of Accused Nos. 1 to 4 and consequent seizure of the contraband becomes a suspect for non-compliance of section 50 of the N.D.P.S. Act. In our view, inclusion of Police Officers, who are also Gazetted Officers, in the raiding party is obvious, however, mention of the fact while apprising the accused regarding their right as contemplated under section 50 of the said Act, suggests, by necessary implication, that the accused were discouraged in opting for search by independent authority. The possibility of misleading the accused also cannot be ruled out in this regard.

9. The learned Counsel for the appellants further pointed out one more glaring infirmity in the prosecution evidence. According to him, at the relevant time and place, all the four accused persons were jointly apprised of their right contemplated under section 50(1) of the N.D.P.S. Act, and therefore there is no valid compliance with the said provision of law which should vitiate the search.

The evidence of P.W. 1, in this regard, shows that he has stated that "They were also given to understand that they were being searched for the suspected narcotics. P.I. Surya also gave them understanding that they had a right to be searched in the presence of Gazetted Officers or Magistrate if they desired so. P.I. Surya also told them that he himself

and Mr. Mehta were the Gazetted Officers. All those four persons then declined the offer and also told that they could be searched by we people." (Emphasis supplied).

Similar is the version given by P.W. 5-P.I. Surya which shows that the appraisal of the right under section 50 of the N.D.P.S. Act was joint and common and not individual."

9. Having regard to the law laid down by this Court, prima facie, there appears to be a breach of the provisions of Section 50 of the NDPS Act while apprising the applicant of his right.

10. The applicant was a pillion rider and was not found in possession of any substance. The statement of witness Vineet Sunil Chandran, whom prosecution alleges as friend of the applicant was recorded on August 6, 2021. In his statement, he has narrated that he met to accused no.3 Sanket Puri in 2017. In 2019, he came to know that the co-accused Sanket Puri was involved in the purchase and sale of LSD paper which is a narcotic substance. The co-accused Sanket Puri had introduced the present applicant and co-accused no.1 to the witness. From their conversation, the witness Vineet could make out that the applicant and the co-accused no.1 were dealing in purchase and sale of drugs.

Then it is stated that sometime in March 2021, when the witness Vineet had met Sanket Puri, he over heard their conversation that these three co-accused had purchased LSD paper and they are going to sell the same. It is, therefore, that the witness Vineet stopped meeting them. It is, thus, seen that the witness Vineet had over heard the conversation between the three accused in March, 2021. From the statement, it is difficult to comprehend the reason for the presence of the witness Vineet who over heard the conversation. The statement forms the material to demonstrate that the applicant was in conscious possession of the contraband apart from the fact that the applicant was a pillion rider. According to me, the materials on record are not at all sufficient to form an opinion that the applicant had knowledge about the accused no.1 is in possession of the narcotic substance.

11. I have already observed that there is a breach of the provisions of Section 50 of the NDPS Act and further that it is doubtful whether the statement of the witness Vineet can be regarded as one of the material to indicate the applicant's conscious possession of the contraband. I am,

therefore, satisfied that there exists reasonable ground to believe that the applicant is not guilty of an offence. No criminal antecedents are reported against the applicant and therefore, in my opinion, he is not likely to commit any offence while on bail. These are my *prima facie* observations which shall not influence the trial. Hence the following order.

ORDER

- (a) The application is allowed.
- (b) The applicant in connection with FIR No.124/2021 registered with the CBD Belapur Police Station, shall be released on bail on his furnishing P.R. Bond of Rs.1,00,000/- with one or more sureties in the like amount.
- (c) The applicant shall report to the Investigating Officer of the concerned police station every alternate Saturday, between 11.00 a.m. and 1.00 p.m. from the Saturday next post his release.
- (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 case there is any change.

12. The application is disposed of.

(M. S. KARNIK, J.)