

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

BAIL APPLICATION NO.1760 OF 2021

Sushant Sambhaji Rasal ..Applicant
VS.
The State of Maharashtra ..Respondent

Adv. Rounak Naik a/w Adv. Ayush Pasbola a/w Adv. Sankalp
Vichare i/b. Adv. Prajyot Shrivastav for the Applicant.
Mr. S. V. Gavand, APP for the State.

CORAM : M. S. KARNIK, J.

DATE : FEBRUARY 1, 2023

P.C. :

- 1.** Heard learned counsel for the applicant and learned APP for the State.
- 2.** This is an application for bail by the applicant-Sushant Sambhaji Rasal in connection with C.R. No.320 of 2019 dated 19/11/2019 registered with Vartak Nagar Police Station for the offence punishable under Sections 8(c), 20(b), 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter "the NDPS Act", for short)
- 3.** On receiving information, the raiding party arrested the accused Nos.1 and 2. Accused Nos.1 and 2 were arrested near Upvan Lake at Thane. They were found in

possession of non-commercial quantity of contraband. Thereafter, on the basis of the information supplied by the accused Nos.1 and 2, the accused No.3 came to be arrested. There was no recovery from the accused No.3. When the accused No.3 was arrested, on 22/11/2019 the accused No.3 informed the authorized officer that the LSD papers which were recovered pursuant to the investigation and found with the accused Nos.1 and 2 were supplied by the present applicant i.e. accused No.4. The applicant came to be arrested on 22/11/2019. Thereafter, the applicant informed the raiding party that the contraband i.e. LSD papers is kept at his residence. The contraband of 104 LSD papers was recovered from the applicant and a quantity of 56 grams of MD, 6.4 grams of Charas was recovered from the applicant's residence. The applicant is now in custody for more than 3 years and 2 months. The applicant admittedly is found in possession of a commercial quantity.

4. Learned counsel for the applicant submitted that there is no compliance with the mandatory provisions of Section 42 of the NDPS Act. According to learned counsel, the

information which was received from the accused No.3 was not reduced in writing as per the requirement of Section 42(1) of the NDPS Act.

5. Learned APP on the other hand submitted that since the Gazetted Officer has authorized the Police Sub Inspector i.e. Investigating Officer to conduct the investigation and therefore, Section 41(1) of the NDPS Act stands sufficiently complied with. It is further submitted that during the course of the investigation and on the information received from the accused No.3 that the accused No.4 is arrested. The Investigating Officer was authorized by the Gazetted Officer to effect the search, seizure and arrest and therefore even the provisions of Section 42 of the NDPS Act stands sufficiently complied with. Learned APP invited my attention to the communication dated 22/11/2019 at page 135 and 137 of the paper book to support his contention that the information has been reduced in writing by the authorized officer.

6. I find that the communication dated 22/11/2019 at page 135 and 137 of the paper book, are issued by the

authorized officer post the arrest of the present applicant. The same therefore can be said to be in compliance with Section 57 of the NDPS Act. So far as compliance with Section 41(2) or Section 42(1) of the NDPS Act is concerned, the information which is supplied by the accused No.3 has not been reduced in writing. Learned Single Judge of this Court in Criminal Appeal No.387 of 1997 in the case of **Mohammed Vakil Mohammed Amin vs. The State of Maharashtra** has observed thus :-

“Confessional statement by an accused to Police in order to be admissible u/s 27 must lead to discovery pursuant to the information contained in the said statement and the fact discovered must be relevant fact. The prosecution should be able to establish connection between the fact discovered and the crime. The discovery of material object is of no relevancy to the question whether the accused is guilty of offence charged against him unless it is connected with the offence. It is the connection of the thing discovered which renders its discovery a relevant fact. In the present case, accused no.2 has not stated that he had received the contraband that was recovered from him, at the particular location. Even if, for the sake of arguments, we presume the accused to have said so by implication due to use of the phrase “usual place near Bandra Court” only admissible part by virtue of information furnished by accused would be that accused no.2 showed the place where he received the contraband. The statement to the extent that he received it from accused no.3 or 4 does not lead to any discovery and, therefore, statement to that effect is hit by Section 25 of Indian Evidence Act. The last part of the statement that Ayub and/or Gawade is likely to come to deliver 1 Kg. heroin as usual is certainly not a statement having connection with the contraband already

recovered from accused no.2.

Therefore, it must be said that the statement by accused no.2 was nothing except information as contemplated by Section 42(1) of NDPS Act, 1985. In fact, PW 6 admitted in her cross-examination that statement given by accused no.2 was information regarding accused nos.3 & 4 and although opinion of a witness on a law point may not be binding on Court, it is felt that Smt. Sawant was correct in making such opinion statement."

7. It would be also profitable to rely upon the decision of this Court in the case of **Anwar Hussain Mohd. Idris Ansari vs. State of Maharashtra and others**¹ paragraph 68 which reads thus :-

"68. Initial information was only regarding transit through Bhandup. The statement by accused No. 3 did amount to further information regarding much bigger haul concealed in the enclosed place. Whether it was information attracting Section 42 of the Act of 1985 and therefore, requiring compliance of section 42(2) of the Act of 1985, is an aspect not considered by either side. In the light of observations of Supreme Court in (Mohinderkumar v. State of Goa), such compliance appears to be necessary. It is not the claim of P.I. Surya that intimation regarding information received by the statement of accused No. 3 was communicated to immediate higher official. The statement was recorded at the office of unit and there was no hindrance in despatching the copy for information to immediate superior official. Non compliance of section 42(2), therefore, makes subsequent recovery suspect."

8. The Hon'ble Supreme Court in the case of **Karnail Singh vs. State of Haryana**² in paragraph 35 has

1 2001 SCC OnLine Bom 121

2 (2009) 8 SCC 539

observed thus :-

"35. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows :

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of Section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable

compliance of Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

9. Learned APP has relied upon the decision of the Hon'ble Supreme Court in the case of **G. Srinivas Goud vs. State of A.P.**³ to submit that it is not necessary for officials of the gazetted rank to comply with sub-section (2) of Section 42 of the NDPS Act. There is no dispute with this proposition. However, present is a case of non-compliance of the requirement of reducing the information which has been provided by the accused No.3 in writing resulting in non-compliance with the mandatory provisions of Section

3 AIR 2005 SC 3647

42 of the NDPS Act.

10. Apart from this, the applicant is in custody for more than 3 years and 2 months. There are no criminal antecedents reported against the applicant. The trial is likely to take long time to conclude. This is an additional circumstance for which the applicant can be enlarged on bail.

11. Hence, the following order :-

ORDER

(a) Application is allowed.

(b) Applicant-Sushant Sambhaji Rasal shall be released on bail in connection with C.R. No.320 of 2019 registered with Vartak Nagar Police Station, on his furnishing P.R. Bond of Rs.50,000/- with one or more sureties in the like amount.

(c) 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.

(d) The applicant shall attend the concerned Police Station once in a month on every Monday of the first week between 11.00 a.m. and 1.00 p.m.

(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 Bail Application is disposed of.

(M. S. KARNIK, J.)