



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

BAIL APPLICATION NO. 1646 OF 2022

Abdul Kadir Ghogari

...Applicant

Versus

1. Union of India

2. State of Maharashtra

...Respondents

...

Mr. Aditya Sharma with Ms Priya Maurya for the Applicant.

Mr. Shriram Shirsat with Mr. Anna Oommen with Mr. Shekhar Mane for
Respondent -NCB

Mr. S.H. Yadav, APP for the Respondent-State.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

ORDER PRONOUNCED ON : 15th SEPTEMBER, 2023

ORAL ORDER :-

1. This is an application under Section 439 of Cr.P.C. filed by the aforesaid Applicant, who is facing trial in NDPS Special Case No.1189 OF 2021 pending on the file of Special Court (C.R.42) (NDPS) at Greater Bombay, for offences under Sections 8(c) r/w 22 (c), 27, 27A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. It is the case of the prosecution that pursuant to specific information received by the Intelligence Officer that a person by name -

Abdul Kadir was to come near Mao Chinese Bhangar Shah Baba Darga, Mahim for sale of substantial quantity of Mephedrone (MD) to a customer, the NCB team and the panchas had proceeded to the spot. The Applicant herein who had come to the said place was accosted and Mephedrone of commercial quantity was recovered from his possession after complying with all the relevant provisions of the NDPS Act. Contraband of commercial quantity was also recovered from the co-accused, from whom the Applicant had purchased the contraband. The Applicant and the co-accused were placed under arrest. The sample which was drawn in presence of the Magistrate, was sent to CFSL and the same has tested positive for Mephedrone. Hence, charge sheet came to be filed against the Applicant and the co-accused for the offences as stated above.

3. The bail application filed by the Applicant has been dismissed by the Special Court mainly on the ground that he was found in conscious possession of commercial quantity of Mephedrone and hence contravention of Section 50 would not per se give a right to seek bail. The learned Judge observed that prima facie there are reasonable grounds to believe that the Applicant is involved in committing the offences as alleged and hence he is not entitled for bail.

4. Mr. Aditya Sharma, learned counsel for the Applicant states that the substance, which was allegedly recovered from the Applicant weighed 55 gms, including the weight of the plastic bag, which weighed 3 gms. Whereas the substance with plastic bag produced before the Metropolitan Magistrate weighed 57.7 gms. He further submits that the substance recovered from the Applicant was in the form of white crystal whereas the substance forwarded to the CFSL was of brown colour. He submits that the sample was packed and sealed and discolouration was not possible due to exposure to air. He therefore contends that there is material discrepancy in the weight and colour of the substance seized.

5. He submits that the Applicant was not searched before an independent Gazetted Officer or before the Magistrate but an option was given to the Applicant to be searched before a gazetted officer, who was the member of NCB team. He therefore urges breach of the safeguards provided under Section 50 of the NDPS Act. He has relied upon the decision of the Apex Court in *SK. Raju Alias Abdul Haque alias Jagga Vs. State of West Bengal (2018) 9 SCC 708, State of Rajasthan vs. Parmanand and Anr. (2014) 5 SCC 345, Intelligence*

Officer, NCB Jammu Vs. Vijay Kumar CRAA No.37 of 2017 and Ishdan Seikh Vs. Union of India, CRA 90 of 2022.

6. Per contra, Mr. Shirsat, learned counsel for NCB states that the contraband was seized on 27/03/2021, the sample was drawn on 23/07/2021 and the same was forwarded to CFSL on 22/09/2021. He submits that the CFSL report indicates that the seals on the parcel were intact and tallied with specimen seal. He submits that the discrepancy in colour could be due to exposure to air or due to chemical reaction. The alleged discrepancy in weight and colour can be explained only in the course of trial.

7. Relying upon the decisions in ***State of Uttar Pradesh vs. Shebu Mohd. Rashid, Special Leave Petition (CRL) No.6727 of 2020*** , ***State of Punjab Vs. Baldev Singh, (1999) 6 SCC 172*** , ***Nabi Alam @ Abbas Vs. State (Govt. of NCT of Delhi Bail Application No.2641 of 2018*** he submits that Section 50 casts a duty on the empowered officer to apprise the person proposed to be searched of his right to be searched before a gazetted officer or Magistrate. It is only in a case where the accused so requires, the personal search is required to be conducted in the presence of the Magistrate or the Gazetted Officer.

He contends that search of the Applicant was taken in presence of a Gazetted Officer, which meets the requirements of Section 50 of the NDPS Act. No bias, unreasonableness or unfairness can be attributed to the Gazetted Officer merely because he is a member of the raiding party. Such presumption is not legally tenable and it is for the Applicant to establish prejudice which could be only at the stage of trial.

8. He submits that the decision in Parmanand (supra) is per incuriam as it does not reconcile with or take into consideration the law laid down by the Apex Court in *State of Rajasthan vs. Ram Chandra (2005), 5 SCC 151* and *Vijaysinh Chandubha Jadeja Vs. State of Gujarat (2011) 6 SCC 609*. He further submits that in SK. Raju (supra) the Apex Court has only made a passing reference to the judgment of Parmanand (supra) and has not confirmed or concurred the view in Parmananda. He therefore contends that the decision in SK. Raju is of no avail to the Applicant.

9. He submits that the Applicant was found in possession of commercial quantity of contraband. The offence is of serious nature, which has a deadly impact on the society. Referring to Section 37 of

the NDPS Act and relying upon the decision of the Supreme Court in *State of Kerala vs. Rajesh and Ors. (2020) 12 SCC 122* and *Narcotic Control Bureau vs. Mohit Agarwal, Criminal Appeal No.1001-1002 of 2022*, he submits that the length of the period of custody or that the charge-sheet has been filed is per se not a ground to release the Applicant on bail.

10. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

11. A perusal of the records reveal that on 27/03/2021, the Intelligence Officer, NCB, Mumbai, had received specific information that one person by name -Abdul Kadir was likely to deliver substantial quantity of Mephedrone (MD) to a customer near Mao Chinese Bhangar Shah Baba Darga, Mahim. The information was reduced in writing and placed before the Superintendent, NCB, Mumbai and Zonal Director, NCB. As per the instructions, the Intelligence Officer alongwith panchas and the other members of the NCB team went to the place disclosed by the Informant. It is the case of the prosecution that at about 21:25 hours, one person, as described in the information note, came to the spot and while he was waiting for someone, the

Intelligence Officer accosted him. The Intelligence Officer introduced himself and sought identity of the said person. The said person disclosed his name as Abdul Kadir. The Intelligence Officer was satisfied that the person accosted was the same person mentioned in the information note. The Intelligence Officer introduced the other NCB officers and the panchas to the Applicant herein and informed him about the specific information received by him. It is alleged that after initial hesitance, the Applicant removed one white colour plastic bag from the right pocket of his jeans and handed over the same to the Intelligence Officer. The said plastic bag contained a zip lock plastic pouch with white colour crystal type substance. The Applicant disclosed that the said substance was Mephedrone.

12. It is the case of the prosecution that the Intelligence Officer had apprised the Applicant of his right to be searched in presence of a Gazetted Officer or a Magistrate and further informed him that Samir Wankhede, Zonal Director was also one of the members of the NCB team, is a Gazetted Officer. It is stated that the Applicant agreed for personal search by any of the Officers of the NCB team. Accordingly, his personal search was taken in presence of the Zonal Director, Samir Wankhede and one red colour mobile phone and a key of a motorcycle

was recovered.

13. The Applicant has alleged non-compliance of Section 50(1) of the NDPS Act, which undisputedly casts a duty on the empowered officer to apprise the suspect of his right to be searched before the nearest Magistrate or a Gazetted Officer. In ***Vijaysinh Chandubha Jadeja*** (supra), the Hon'ble Supreme Court has held that the mandate of section 50 is precise and clear viz., if the person intended to be searched expresses to the authorized officer his desire to be taken to the nearest Gazetted Officer or the Magistrate, he cannot be searched till the Gazetted Officer or the Magistrate, as the case may be, directs authorized officer to do so. It is emphasized that the object with which the right under section 50(1) of the NDPS Act by way of a safeguard, has been conferred on this aspect viz. to check the misuse of power, to avoid harm to innocent person and to minimize the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a Gazetted Officer or a Magistrate. The Hon'ble Supreme Court has held that the obligation under Sub-Section 1 of section 50 of the NDPS Act is mandatory and requires strict compliance and the concept of

‘substantial compliance’ is neither borne out from the language of section 50(1) nor in consonance with the dictum laid down in Baldev Singh case (1974) 2 SCC 33. Failure to comply with the provision would render the recovery of illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. It is held that thereafter the suspect may or may not choose to exercise the right provided to him under the said provision.

14. In *Parmanand* (supra), the accused were apprised that they could be searched before the nearest Magistrate or before the nearest Gazetted Officer or before the Superintendent, who was part of the raiding party. The third option was held to be in breach of Section 51 of the NDPS Act. The Hon’ble Supreme Court held that the idea behind taking an accused to the nearest Magistrate or nearest Gazetted Officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer and it was improper to give the accused a third alternative of being searched before the Superintendent, who was a part of the raiding party and who could not be called as an independent officer.

15. It is pertinent to note that in ***Ram Chandra*** (supra), the superior officer had arrived at the spot after the person was detained and search was proposed to be done by the officer authorized. It was in this context that the Hon'ble Supreme Court observed that “*the object of the Act being that the search is conducted in the presence of a superior officer, in order to lend transparency and authenticity to the search, it cannot be held as a principle in law that if a superior officer happens to be the officer authorized (which) the High Court has described as the member of a raiding party) the position would be different. The High Court proceeds on the basis that there may be bias on the part of the officer because he was accompanying the officer authorized. Such a presumption is not legally available.*”

16. A three Judge Bench of the Hon'ble Supreme Court in **SK. Raju** (supra), while considering the scope of Section 50(1) has held that an empowered officer should necessarily inform the suspect about his legal right, if he so requires, to be searched in the presence of a gazetted officer or a Magistrate. Referring to the decision in ***Vijaysinh*** (supra) it was reiterated that strict compliance with Section 50(1) by the empowered officer is mandatory in the case of search of a person. The Hon'ble Supreme Court considered the decision in ***Parmanand***

(supra) and distinguished it on facts. I am unable to accept the contention of learned Counsel for the NCB that the decision in *Parmanand* (supra) is per incuriam and that the Hon'ble Supreme Court has only made a passing reference to the said decision in *SK. Raju* (supra).

17. There can be no dispute that the police officer being a Gazetted Officer is not disqualified to witness a search in terms of Section 50 of the NDPS Act. However, as held by the Apex Court in *Parmanand* (supra), such superior officer who is a part of the investigating team, cannot be considered as an independent officer. As noted above, the Constitutional Bench in *Vijaysinh Chandubha Jadeja* (supra) has emphasized that the object of the Section 50 is to check the misuse of power and to minimize the allegations of planting or foisting false cases by the law enforcement agencies. An offence under the NDPS Act being grave, the procedural safeguards provided under the statute require strict compliance and breach thereof will frustrate the very object of the provision. It is in this context that the presence of an independent Gazetted Officer, not being part of a raiding party or investigating team assumes importance.

18. In the instant case, the Applicant had allegedly kept the contraband in the pocket of his jeans. The panchanama as well as the complaint reveals that the Applicant was apprised that he could be searched before the nearest Magistrate or a Gazetted Officer. He was further informed that Samir Wankhede, who was a member of the raiding team was also a Gazetted Officer. It is alleged that the Applicant stated that he could be searched by any of the members of NCB team and thereafter he was searched in presence of Samir Wankhede. It is not in dispute that Samir Wankhede was a member of the raiding party and hence he cannot be considered as an independent witness. No doubt the question whether the procedure prescribed under Section 50(1) has been followed or not is a matter of trial, nevertheless, prima facie, it appears that there is no compliance of Section 50(1) of the NDPS Act.

19. The records reveal that the Intelligence Officer had weighed the substance recovered from the Applicant and the total weight was found to be 55 gms. The substance and the plastic pouch were separately weighed and the weight of the substance was 52 grams and that of the plastic pouch was 3 gms. The substance was put in a zip lock polythene bag, which was sealed with NCB seal-marked as 'M-1'

was deposited in the godown of NCB-Mumbai on 28/03/2021 under receipt entry No.126 of 2021. On 23/07/2021 an application was made to the Metropolitan Magistrate to draw sample from bulk muddemal. Accordingly, the muddemal was produced before the Metropolitan Magistrate and two representative samples were drawn from the whole quantity and marked Exhibit -M-1 S-1. The sample was forwarded to CFSL and as per the report Mephedron was detected in the sample M-1 S-1.

20. The records reveal that though the contraband was seized on 27.3.2021, an application for drawing sample was made before the Magistrate only on 23.7.2021. The sample was drawn and forwarded to CFSL on the same day i.e. on 23.7.2021. There is inordinate delay in making an application / drawing of sample and certification, and forwarding the sample to the CFSL for analysis. This is not in consonance with the dictum of the Apex Court in ***Union of India vs. Mohanlal (2016) 3 SCC 379***, wherein the Apex Court has held that application for sampling and certification ought to be made without undue delay. Though the Hon'ble Supreme Court has not prescribed a time frame, it has been emphasized that such process has to be completed within reasonable time. In the instant case, the application

for sampling and certification was made after four months, which prima facie cannot be considered as reasonable time.

21. The panchnama and the complaint indicate that the total weight of the substance and the plastic bag, seized by the investigating agency, was 55 grams and when weighed separately, the weight of the contraband was 52 grams, and that of the plastic bag was 3 grams. The certificate under Section 52A(2) of the NDPS Act issued by the Metropolitan Magistrate reveals that the weight of the contraband and the plastic pouch was 57.7 grams. Prima facie, there is discrepancy in the weight of the contraband which was seized and the weight of the contraband that was forwarded to the Magistrate under Section 52A of the NDPS Act. The reply filed by the intelligence officer does not offer any explanation for the delay in making an application before the Magistrate for drawing the sample and certification or the discrepancy in the weight of the substance seized from the Applicant. The above discrepancies prima facie raise a reasonable doubt about the involvement of the Applicant in the aforesaid crime. Consequently, the rigour of Section 37 of the NDPS Act would not be applicable. It is stated that the Applicant has no criminal antecedents. He is in custody since last two years and considering the large pendency of the

cases and the fact that the charge is not yet framed, the trial is not likely to be concluded within a reasonable time. In such circumstances, prolonged incarceration and deprivation of personal liberty would be violative of the fundamental rights conferred by Article 21 of the Constitution of India. Reliance is placed on the decision in ***Rabi Prakash Vs. The State of Odisha*** in ***Special Leave to Appeal (Crl.) No.4169 of 2023*** wherein the Hon'ble Supreme Court has observed that *"The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act."*

22. Hence, the Application is allowed on the following terms and conditions :-

- (i) The Applicant, who is facing trial in NDPS Special Case No.1189 of 2021 pending on the file of Special Court (C.R.42) (NDPS) at Greater Bombay, he 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 PR bonds in the sum of Rs.50,000/- with one or two sureties to the like amount;
- (iii) The Applicant shall report NCB, Mumbai Zonal Unit, Mumbai, once in three months on the first Monday of the month between 11.00 a.m. to 2.00 p.m.
- (iv) The Applicant shall co-operate with the conduct of the trial and attend the trial Court on all dates, unless exempted.
- (v) The Applicant shall not leave the State of Maharashtra without prior permission of the court.
- (vi) The Applicant shall not interfere with the witnesses or tamper with the evidence in any manner.
- (vii) The Applicant shall keep the Investigating Officer informed of his current address and mobile contact number, and/or change of residence or mobile details, if any, from time to time.

23. The application stands disposed of.

24. It is made clear that observations made hereinabove be construed as expression of opinion only for the purpose of bail and the same shall not in any way influence the trial in other proceedings.

(SMT. ANUJA PRABHUDESSAI, J.)