

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

BAIL APPLICATION NO. 3158 OF 2021

Aarif Akram Shaikh	...Applicant
Versus	
The State Of Maharashtra	...Respondent

Adv. Kamlesh Satre a/w Adv. Vikas Chavan for the Applicant.

Mr. S. V. Gavand, APP for the State.

CORAM: M. S. KARNIK, J

DATED: FEBRUARY 7, 2023

PC:-

- 1.** Heard learned counsel for the applicant and learned APP for the State.
- 2.** This is an application for bail by the applicant- Aarif Akram Shaikh in connection with C.R. No.I-392 of 2021 dated 19/05/2021, registered with Kashimira Police Station, under sections 8(c), 21(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter "NDPS Act", for short).
- 3.** The First Information Report was registered on 19/05/2021. The alleged incident is dated 18/05/2021. There are in all 3

accused. During the course of the investigation in respect of an accidental death, the Investigating Officer noticed 3 people loitering in suspicious circumstances. Accordingly, the Investigating Officer carried out the search. It is not in dispute that the Empowered Officer who also happens to be the Investigating Officer under section 42 of the NDPS Act, apprised the persons their right under section 50 of the NDPS Act to be searched before a Gazetted Officer or to the nearest Magistrate. The accused waived the right to be searched before Gazetted Officer in terms of section 50 of the NDPS Act.

4. The search was actually carried out by the Police Sub Inspector (PSI) and the Police Naik. On page no. 66 of the paperbook the search panchnama dated 18/05/2021 records that PSI Hitendra Vichare and Police Naik Shri Sawant conducted a search of the applicant in presence of 2 panchas. So far as the applicant is concerned, he is the original accused no. 2. From his possession 80 gms of MD which is admittedly a commercial quantity was found.

5. Learned APP submitted that the recovery happened to be chance recovery and therefore, merely because one of the

persons who searched the applicant happened to be Police Naik will not make any difference as in such case the provisions of section 42 of the NDPS Act will not apply. In the submission of the learned APP, the search is not pursuant to any information received which is reduced in writing to attract section 42 of the NDPS Act. According to him, only when section 42 of the NDPS Act applies that, any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of the Police can only conduct the search.

6. In the present case, it is not in dispute that the applicant was apprised of his rights under section 50 of the NDPS Act. This was by way of abundant caution, as is the submission of the learned APP. Having informed the applicant of his right to be searched in the presence of Gazetted Officer, in view of the express provisions of section 50 of the NDPS Act, the search has to be carried out by the officer mentioned in section 42 of the NDPS Act. It is not in dispute that the PSI along with the Police Naik conducted the search. For convenience section 50 of the NDPS Act is reproduced which reads thus:

“50. Conditions under which search of persons shall be conducted.—

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973.

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

7. Learned counsel for the applicant relied upon the order dated 23/08/2022 passed by this Court in **Haji Mohd. Abdul Kadar Bhumedia Vs. The State of Maharashtra**¹. Paragraph Nos 7 and 8 of the said order read thus:

¹ Bail Application No. 378 of 2022

“7 Section 42 of the NDPS Act prescribe the power of entry, search, seizure and arrest, and it specifically enumerate the Officers who are empowered to exercise the said power. Section 42 envisage that any such Officer (being an officer superior in rank to a peon, sepoy or constable), apart from the other department, the Police Department of the State Government is empowered to take search of the person under the Act, in exercise of powers conferred by sub-section (1) of Section 42 of the NDPS Act.

The Government of Maharashtra has issued a circular on 14/11/1985, prescribing that all Officers of, and above the ranking of Head Constables in the State of Maharashtra are permitted to take search u/s.42. The said circular categorically designate the Police Officers of, and above the ranking of Head Constables, as competent Officers who are empowered to exercise the powers under sub-section (1) of Section 42 i.e. of search and seizure.

Admittedly, from the panchnama, it is apparent that the API directed the Police Naik to carry out the search, and it is he who carried the personal search of the applicant, which lead to the recovery of Mephedrone. Since the Police Naik is below the rank of Head Constable in the State of Maharashtra, he is not an empowered Officer and though the search is carried out in presence of the API, it is not a valid search.

. In Dilkush Sinai vs. State of Goa, 1995(2), Goa.L.T, where the PSI himself did not search the accused, but directed the two panch witnesses to conduct the search, the question that arose for consideration before the Division Bench was whether the search by panchas in presence of PSI, was legal one and if not, whether the trial would be vitiated on account of the fact that the search was illegal. The Division Bench of this Court, held as under :-

“15. We have therefore no hesitation in upholding the submission of the learned counsel for the appellant on this aspect of the case. We hold that the search was effected by a person unauthorised to effect the search under the law. We hold that the trial of the accused was vitiated as a result of the said unauthorised illegal search. It must be stated in the passing that on this aspect of the case the learned counsel for the appellant also relied on the observations made by the Division Bench of this Court in the case of Ramchandra Tolaram Khatri and another v.

The State reported in AIR 1956 Bombay 287. In this case, it was held by the Court that merely because the police took the panchas with themselves before the raid, the panchas do not become members of the raiding party and cannot be looked upon as partisan witnesses”.

8 The Division Bench in case of Rolf Michael (supra) made reference to the notification authorizing the officers of the Police Department in the State of Goa, in exercise of power conferred u/s.42 of the NDPS Act and the notification dated 11/2/1986, authorized all Officers not below the rank of Assistant Sub Inspector of Police in the Police Department.

Dealing with the situation where the search was carried out by the Head Constable one Mr.Mayekar, though in presence of PSI, the Division Bench arrived at the following conclusion.

“15 We, therefore, have no hesitation in holding that the search by Mayekar, the Head Constable, was unauthorized since he was not empowered to conduct the search under Section 42 of the Narcotic Drugs And Psychotropic Substances Act and consequently the search was illegal. Since the search was illegal, the trial was vitiated and conviction based on such trial cannot be sustained and has to be set aside, which we hereby do. In view of our finding on this point, we think it unnecessary to go into the other aspects canvassed by the learned Senior Counsel appearing for the accused”

With the aforesaid observation, the Criminal Appeal was allowed and the judgment and order of conviction and sentence passed by the Special Judge, came to be set aside.

.. Since, there is no dispute about the factual aspect before me by applying the legal position to the effect that the search is carried out by an unauthorized officer, I am prima facie satisfied that there are reasonable grounds for believing that the search being illegal, and the applicant is not guilty of the offence and in absence of any antecedents being attributed to him, he is not likely to commit the offence in future.

Recording that there is a clear breach of Section 42(1) of the NDPS Act, the applicant deserve his release on bail.”

(emphasis supplied by me)

8. Learned APP made an attempt to distinguish the decision

relied by the learned counsel for the applicant. He would submit that in that case it was only Police Naik who had carried out the search, whereas, in the present case, the PSI along with the Police Naik carried out the search.

9. In my opinion, having regard to the language of section 42 of the NDPS Act, only the officers mentioned therein are empowered to carry out the search. It may be that the PSI was authorised, but the search was also carried out by the Police Naik. The Police Naik was not authorised to carry out the search. *Prima facie*, in my opinion, the search carried out also by one of the official (Police Naik) who was not authorised, renders the search illegal. These observations are resitricted for considering the application for bail. I am, *prima facie*, satisfied that there are reasonable grounds for believing that the applicant is not guilty of the offence.

10. Apart from what is observed above, I find that there are no criminal antecedents reported against the applicant and therefore, it is unlikely that he will commit the same offence in future. The applicant is in custody since 18/05/2021 for a period of more than 1 year and 8 months, without the possibility of the

trial concluding any time soon. The applicant, therefore, can be enlarged on bail by imposing stringent conditions. Hence, the following order.

ORDER

- (a)** Applicant- Aarif Akram Shaikh in connection with C.R. No.I-392 of 2021, registered with Kashimira Police Station, shall be released on bail, on his furnishing P.R. Bond of Rs.50,000/- with one or more local sureties in the like amount;
- (b)** 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;
- (c)** On being released on bail, next Saturday onwards, the applicant shall report to the concerned police station twice a month, on alternate Saturdays, between 11.00 a.m. and 1.00 p.m.;
- (d)** 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.

11. The application stands disposed of.

(M. S. KARNIK, J.)