

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO.3456 OF 2023
IN
CRIMINAL APPEAL NO.934 OF 2023

Sanjay Jain .. Applicant
Versus
Akshay Hunurkar & Anr. .. Respondents

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Mr.Anil Lalla i/b Lalla & Lalla for the Applicant.
Ms.Ameeta Kuttikrishnan for the CBI.
Ms.M.R.Tidke, A.P.P. for the State/Respondent.

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CORAM: BHARATI DANGRE, J.
DATED : 09th NOVEMBER, 2023

P.C:-

1. By the present application, the Applicant who has filed an Appeal calling in question his conviction and sentence imposed upon him by the Additional Sessions Judge & Special Judge, NDPS Thane in NDPS Special Case No.31 of 2015, seeks suspension of his sentence and pray for his release on bail, pending the adjudication of his Appeal.

2. Heard the learned counsel Mr.Anil Lalla for the Applicant, who is opposed by Ms.Ameeta Kuttikrishnan, who represents the CBI.

The Applicant faced trial in NDPS Special Case No.31 of 2015 for committing the offences punishable under Section 22 read with Section 8(c), 28, 29 and 30 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, “**the NDPS Act**”).

3. As per the case of the prosecution, on the information received by the Intelligence Officer, that the present Applicant alongwith his accomplice, one Pramod Pandey, was in possession of substantial quantity of contraband substance, viz. Mephedrone in his Flat No.202, Ostwal Orchid, Mira Road, Thane, a search was carried out and it lead to seizure of 5 kg. white crystalline powder, which was analyzed to be Mephedrone, a psychotropic substance. As per the prosecution, the substance was supplied by Accused No.2- Pramod Pandey and the present Applicant used to deliver and supply the Mephedrone, as per his order, by supplying courier parcels. The information supplied by the present Applicant that Accused No.4 would be visiting the flat for collecting Mephedrone, lead to Accused No.4-Chandramani Pandey, Pramod Pandey and Laduram Kumawat.

The statement of the Applicant alongwith other co-accused was recorded under Section 67 of the NDPS Act and in his statement, Pramod Pandey gave the information that he had arranged 5 kg of Mephedrone, which would be supplied by the two persons i.e. Accused Nos.8 and 9 to Accused Nos.5 and 6 and the said delivery was to take place in front of Hotel Regency and this lead to another search by the team of the Department, which lead to recovery of crystalline powder, being approximately 25 kg.

The samples of substance collected during the first and second raid were sent to Chemical Analyser to confirm that it was Mephedrone.

4. The case of the prosecution led the Special Judge to ascertain whether the prosecution proved that Accused Nos.1 to 4 with other accused entered into conspiracy to procure, sale, purchase, transport inter-state, store and possess 5 kgs of Mephedrone illegally and whether Accused No.2 in pursuance of the conspiracy, transported 21.45 kgs of Mephedrone to the premises exclusively in possession of Accused No.1-Sanjay Jain, to be disbursed to various customers.

5. On analyzing the prosecution case placed before it, the Special Judge recorded that it is only the present Applicant, who is found to have been in possession of the contraband and as far as the second raid is concerned, since inspite of sufficient efforts, the prosecution could not trace out the panch witness to prove the panchnama and it has proved to be fatal to the case of the prosecution. The exclusive possession of the contraband was proved as far as the Applicant is concerned, since PW 10-power of attorney holder of the landlady in respect of Flat No.202, produced the Agreement as well as the bank passbook, where the Applicant has transferred the amount towards the rent of that flat.

On appreciation of the evidence, the Special Judge recorded that the prosecution had proved that Applicant-

Sanjay Jain was in possession of 5 kg of Mephedrone, the commercial quantity of psychotropic substance in contravention of Section 8(c) and thus committed the offence punishable under Section 22(c) of the NDPS Act. It is further recorded that the prosecution has failed to prove that the offence is committed in pursuance of the conspiracy hatched by the accused persons and the other accused persons were acquitted, since there was no evidence against them except their statements recorded under Section 67 of the NDPS Act, which are not admissible in the wake of the decision in the case of *Tofan Singh Vs. State of Tamil Nadu*¹.

6. On finding the Applicant guilty of being in possession of 5 kg. of Mephedrone and by recording that he found in possession of much higher quantity than the prescribed commercial quantity, which is prescribed to be 50 gm, on finding him guilty of committing an offence under Section 8(c) of the NDPS Act, he was imposed with a sentence of R.I. for the period of twenty years and to pay fine of Rs.1,00,000/-.

7. The Appeal filed by the Appellant is admitted by me.

Mr.Lalla has argued before me that the other accused persons, who were tried alongwith the Applicant, having been acquitted and, since the charge of conspiracy has not been proved, the learned Judge could not have found him guilty under Section 8(c) and awarded him the sentence of twenty years imprisonment. Mr.Lalla would submit that Section 32-B

¹ (2021) 4 SCC 1

of the NDPS Act prescribe the factors to be taken into account for imposing higher than the minimum punishment and when Section 22(c) provide that whenever the contraband involves commercial quantity, the punishment prescribed may be not less than ten years, but which may extend to twenty years, there is no justification in the learned Judge imposing the maximum punishment of twenty years.

Apart from this, Mr.Lalla has invited my attention to another important facet, being non-compliance of Section 52-A of the NDPS Act and by relying upon the decision of the Apex Court in the case of *Union of India Vs. Mohanlal & Anr.*², he would also place reliance upon the two recent decisions of the Apex Court in the case of *Simranjit Singh Vs. State of Punjab (Cri.Appeal No.1443 of 2023 decided on 09.05.2023)* and *Yusuf @ Asif Vs. State (Cri.Appeal No.3191 of 2023 decided on 13/10/2023)*.

8. On perusal of the impugned judgment, I cannot ignore the findings rendered by the Special Judge, on appreciation of the evidence and, in particular, when the recovery of 5 kg. of Mephedrone from the Applicant is conclusively proved, though the charge of conspiracy has failed, independent of conspiracy, since the seizure was proved as against the present Applicant, he has been rightly convicted.

As regards the imposition of the sentence higher than the prescribed minimum, I must refer to the decision of the Apex Court in the case of *Gurdev Singh Vs. State of Punjab*³,

² (2016) 3 SCC 379

³ (2021) 6 SCC 558

where the provision came to be interpreted with particular reference to the terminology used, “such factors as it may deem fit” and it has been held that on fair reading of Section 32-B of the Act, it cannot be said that while imposing a punishment higher than the minimum term of imprisonment or amount of fine, the Court has to consider only those factors, which are mentioned/enumerated in Section 32-B of the Act. It has been categorically held that the quantity of the substance with which the Accused is charged is a relevant factor, which can be taken into consideration while fixing the quantum of punishment. Hence, considering the ginormous quantity of 5kg of Mephedrone, no fault can be found in the impugned judgment imposing the maximum punishment and, therefore, I am not convinced with the argument of Mr.Lalla that on the said count, he deserve his release on bail.

9. However, my attention is invited to another aspect as regards the law that has been evolved involving Section 32-B of the NDPS Act.

In *Mohanlal* (supra), a specific direction is issued by the Apex Court to the effect that 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, who 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 and the sampling shall be done in supervision of the Magistrate.

In the case of ***Simarnjit Singh*** (supra), upon a conviction by the Special Judge under the NDPS Act, when an Appeal preferred by the Accused was dismissed by the High Court, the Apex Court relying upon the decision in the case of ***Mohanlal*** (supra) dealt with the submission that the prosecution is vitiated, as the work of drawing sample was done without taking recourse to sub-section (2) of Section 52-A of the NDPS Act, as the samples were drawn immediately after the seizure.

In this background, Their Lordships of the Apex Court in the judgment dated 09/05/2023 observed as under :-

“9. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of ***Mohanlal***. This creates a serious doubt about the prosecution’s case that substance recovered was a contraband.”

In yet another decision in the case of ***Yusuf @ Asif*** (supra), once again relying upon the decision in the case of ***Mohanlal*** (supra), the following observations are recorded :-

“15. In Mohanlal's case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

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 lakh and in default of payment of fine to undergo further imprisonment of one year is hereby set aside.”

Resultantly, the Appeal has been allowed.

10. In the wake of the aforesaid position, since in the present case, there is no compliance of Section 52-A as though there is seizure of the contraband from the Applicant, it was not taken to the Magistrate and samples were not drawn in his presence and it raises a doubt about the said seizure.

Since the Applicant has already undergone a sentence of more than 8 years and 10 months out of the sentence imposed and his Appeal, challenging the said conviction, is pending for adjudication in this Court, he deserve suspension of sentence and his release on bail. Hence, the following order.

: ORDER :

(a) The sentence imposed on the Appellant by NDPS Special Judge, Thane vide judgment and order dated 01/07/2023 in NDPS Special Case No.31 of 2015 is suspended.

(b) Applicant – Sanjay Jain shall be released on bail in NDPS Special Case No.31 of 2015 on furnishing P.R. Bond to the extent of Rs.50,000/- with one or two sureties in the like amount.

(c) The Applicant shall mark his attendance before the Intelligence Officer, Narcotics Control, Mumbai on first Monday of every trimester between 5.00 to 6.00 p.m.

(d) On being released on bail, the Applicant shall furnish his contact number and residential address to the Intelligence Officer, Narcotics Control, Mumbai and shall keep him updated, in case there is any change.

(SMT. BHARATI DANGRE, J.)