

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO. 3140 OF 2022

Rashid Aslam Shaikh .. Applicant
Versus
The State of Maharashtra .. Respondent

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Mr. Ayaz Khan for the applicant.
Ms.P.N. Dabholkar, APP for the State.
PSI Shri A.S. Chavan from Naya Nagar police station.

CORAM: BHARATI DANGRE, J.
DATED : 13th APRIL 2023.

P.C:-

1 This is a second Bail Application filed by the applicant, pursuant to the first being withdrawn, when I had expressed my disinclination to entertain the same.

2 The applicant is charged in Special Case No.296/2021 filed against him by Police Sub Inspector, Naya Nagar Police Station. He face accusation of being found in possession of 60 gms of Mephedrone (M.D) and therefore, he has been charged for the offence punishable u/s.8(c), 20, 22, 29 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (for

short 'NDPS Act'). He came to be arrested on 7/1/2021 and is presently incarcerated.

3 The case of the prosecution in the charge-sheet is to the effect that on information being received by the concerned police station, that on 7/1/2021 at about 6.45 hours, two persons would come on the given place for selling Mephedrone, accordingly a trap was laid and the applicant along with accused no.2 were apprehended and they were found to be in possession of 60 gms Mephedrone and 50 gms of *charas*.

4 The learned counsel Mr.Khan, while arguing the application on the second count, would submit that the procedural requirement of Section 50 is not adhered to, while the applicant was apprehended and his submission is that the requirement contemplated u/s.50 in respect of search and seizure, which make it imperative for the Investigating Officer to permit the accused to be searched in presence of the gazetted Officer or the nearest Magistrate must yield the search illegal and it is the submission of Mr.Khan that since the provisions of the NDPS Act prescribe severe punishment on proof of possession of illicit article/contraband, the legislature has struck a balance by providing certain safeguards and the same should be strictly adhered to.

Mr.Khan would place reliance upon the decision of the Apex Court in case of *Beckodan Abdul Rahiman Vs. State of*

Kerala, (2002) 4 SCC 299, to submit that in the given circumstances, even when there was partial compliance of Section 50, the conviction was set aside by the Supreme Court, by holding that the compliance of Section 50 of the Act, give an option to a suspect for being searched in the presence of Gazetted Officer or the Magistrate and when the accused is not apprised of his right, nor any option is offered to him, the search cannot be sustained in law. He would also rely upon the order passed by the learned Single Judge (A.S. Gadkari, J) in Criminal Bail Application No.592/2018, where the applicant was released on bail by relying upon the decision of the Apex Court in case of *State of Rajasthan Vs. Parmanand and Anr, 2014 (2) SCC (Cri)*.

5 Further, my attention was invited to a portion of panchnama regarding the search and seizure dated 7/1/2021 and I passed the following order :-

“1 In an earlier round of the application, when the applicant sought his release on bail, I expressed my disinclination by taking note of the non-compliance of Section 50 of the NDPS Act, since it was so recorded in the panchnama.

In the second round, Mr.Khan has invited my attention to the ultimate portion of the panchnama dated 7/01/2021 and therefore, I asked learned APP to produce the typed copy of he panchnama so prepared, which is reported to have signed by Police Inspector Kailas Barve and the panchas.

2 The learned APP, on instructions of PI Mr.Jitendra Vankoti, who is present in the Court, inform that the panchnama was signed by Mr.Dilip Salunke PI, Nayanagar Police Station, but the learned APP state that he has retired now.

3 In these circumstances, it has therefore become evident that the portion recorded in the panchnama is an incorrect recording and there is no such document prepared. Since the person, who signed the document, has retired, he cannot be expected to swear an affidavit to that effect and, I deem it appropriate to direct the ACP, Navghar Division, Mira Bhayander, Vasai Virar, Police Commissioner, shall file an affidavit after ascertaining the facts of the case and pursuant to the said affidavit, an appropriate inference would have to be drawn, if it is found that the recording in the panchnama is not truthful.

Let such affidavit be filed on or before 30/03/2023. List on 31/03/2023”.

6 In furtherance of the same, an affidavit is filed by Shashikant Bhosale, ACP, Navghar Division, Mira Bhayander, Vasai, where a specific statement is made to the following effect :-

“6 I say that the record shows that the said panchnama dated 07.01.2002 is as hand written and was done in presence of Police Inspector, Shri Dilip Salunkhe in which inadvertently it has been written that *“it is printed on a printer at Police Station and Police Inspector Shri Kailas Barve signed it”*.

7 It is pertinent to note that in the copy FIR bearing No.13/2021, dated 07/01/2021, in which it is clearly mentioned that the spot panchnama has been done in presence of Police Inspector Shri Dilip Salunkhe at the place of incident only and not at the police station”

7 The learned APP Ms.Dabholkar concede to the fact that there is incorrect recording in the ultimate portion of the panchnama, and in fact, there is no print of the panchnama taken on the portable printer nor it bear signature of PSI Kailas Barve and the panchas.

8 When the panchnama is carefully perused, it bear the signature of Dilip Salunke, PI, Naya Nagar police station, and there is no reason why the name of Kailash Barve is mentioned in the said panchnama. The panchnama dated 7/1/2021 is the narration of two panchas and it make reference to PI Dilip Salunke, but there is no reference of Kailas Barve and the entire narration of the panchas is based on the instructions of Dilip Salunke.

When the version of the panchas is carefully perused, it is stated that the two accused persons are appraised of their legal right by informing that they are entitled to be searched in presence of the Magistrate if they desire to do so, and the necessary arrangement can be made.

9 The panchnama, therefore, reflect a partial compliance of the right u/s.50 of the NDPS Act, to be searched in presence of the Magistrate.

The communication of the right to the person who is about to be searched is not a mere procedural formality, but it is an imperative mandate provided by the legislature which would ensure that there is no misuse of the powers by those who are implementing the provisions of the Act, and since it was not informed to the applicant that he has a right to be searched before the gazetted officer also, prima facie, there is violation of Section 50 of the NDPS Act, which would make the recovery of the alleged contraband i.e. M.D, doubtful.

10 Apart from this, the approach of the prosecution is evidently casual when the panchnama record that it was printed on the portable printer and it was signed by PI Kailas Barve and the panchas. Apart from this, a glaring lacuna which appear is the timing of recording of the panchnama, which is shown to have commenced at 7.25 hours and indeed on 9.00 hours, whereas having looked at the First Information Report, the date and time of registration of the FIR, is shown to be 9.45 hrs and the information is shown to be received at 9.05 hours. Mr.Khan is, therefore, perfectly justified in submitting that the C.R came to be registered within five minutes of the completion of the panchnama, which is practically impossible.

The aforesaid lacunae which created doubt in the version of the prosecution definitely warrant consideration and if at all, it deserves the benefit of doubt, it must go in favour of the applicant. This aspect was not pointed out at the time of hearing of the first Bail Application and since this aspect goes to the root of the matter, I have deemed it expedient to consider the same, at the stage of second Bail Application.

11 In the wake of the above, and particularly when the Assistant Commissioner of Police has admitted in the affidavit in reply that a mistake was done by Police Inspector Dilip Salunke while preparing a spot panchnama dated 7/1/2021, apologies are expressed, I deem it appropriate to release the applicant on bail subject to the following terms and conditions :-

ORDER

- (a) The Applicant – Rashid Aslam Shaikh in connection with C.R.No..13/2021 registered with Navghar Police Station shall be released on bail on furnishing P.R. bond to the extent of Rs.25,000/- with one or two sureties of the like amount.

The applicant shall be released on cash bail of Rs.25,000/- in lieu of sureties for a period of six weeks. During the said period, the applicant shall arrange for the sureties.

- (b) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case so as to dissuade him from disclosing the facts to Court or any Police Officer. The Applicant should not tamper with evidence.
- (c) The Applicant shall mark his attendance with the concerned police station on every Thursday once in a trimester.
- (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, if there is any change.

(SMT. BHARATI DANGRE, J.)