



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

BAIL APPLICATION NO.109 OF 2024

1. Azim s/o. Jafar Qureshi,
Age 32 years, Occu. Business,
R/o. Sanjay Nagar, Kopargaon,
District Ahmednagar
2. Wajid s/o. Kalim Qureshi,
Age 32 years, Occu. Business,
R/o. As above .. Applicants

Versus

State of Maharashtra
Through Kopargaon City Police Station,
District Ahmednagar .. Respondent

Ms. Shilpa Aurangabadkar, Advocate holding for Mr. Satej S.
Jadhav, Advocate for Applicants;
Mr. S. B. Narwade, A.P.P. for Respondent

...
**WITH
BAIL APPLICATION NO.914 OF 2024**

1. Dinesh s/o Bhawarlal Chaudhary (Jat),
Age 21 years, Occu. Labourer,
R/o. Gangapur, Taluka Shahada,
District Bhilwada, State Rajasthan
2. Sharukh Khan Jakir Khan Pathan,
Age 21 years, Occu. Labour/Driver,
R/o. Bhilwada City, Taluka Bhilwada
State Rajasthan .. Applicants

Versus

State of Maharashtra
Through Police Inspector,
Anand Nagar Police Station,
Osmanabad, District Osmanabad .. Respondent

Ms. Sheetal V. Salunke, Advocate for Applicants;
Ms. D. S. Jape, A.P.P. for Respondent

CORAM : S. G. MEHARE, J.
RESERVED ON : 20-07-2024
PRONOUNCED ON: 14-08-2024

PER COURT :-

1. Heard the learned counsel for the applicants and the learned A.P.P. for the respondent.
2. In Bail Application No.109 of 2024, applicants - (1) Azim s/o Jafar Qureshi and (2) Wajid s/o Kalim Qureshi seek bail in C.R.No.503 of 2023 registered with Kopargaon City Police Station, District Ahmednagar, for the offences punishable under Sections 8(c), 20(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "NDPS Act").
3. In Bail Application No.914 of 2024, applicants - (1) Dinesh s/o Bhawarlal Chaudhary (Jat), (2) Sharukh Khan Jakir Khan Pathan seek bail in C.R.No.74 of 2023 registered with Anand Nagar Police Station, District Osmanabad, for the offences punishable under Sections 20(b)(ii), 20(b), 8(c) of the NDPS Act.
4. The prosecution has a case against applicants Azim and Wajid that Police got a secret information that the accused were carrying contraband on the bike for sale. Police formed a raiding

team, and thereafter, the trap was laid at about 19.35 p.m. near Sai Corner, Ahmednagar, and found three persons coming on a bike. They intercepted them. The accused tried to flee away, however, the police succeeded in apprehending them. The applicants told the police their names. Then, the notices under Section 50(1) of the the Narcotics Drugs and Psychotropic Substances Act ("NDPS Act", for short) were served upon them. Their physical search and search of bags were taken. The police found green leafy and sticky substance in their bags weighing 5 kg each. The total quantity recovered was 10 kgs. The police extracted samples from two bags on the spot itself and prepared recovery panchnama.

5. The prosecution has a case that there was a vehicular accident in front of Shingoli Rest House. Therefore, a Constable was deputed there. He inspected Tata make vehicle. Dinesh and Shahrukh Khan were the possessors of that vehicle. The police found contraband like Ganja in the dickey. It was 130 Kilos and 561 Grams. They were immediately taken into custody. Police searched the vehicle. Before the search, a notice under Section 50 of the NDPS Act was served upon them.

6. Applicants Azim and Wajid seek bail on the grounds that they have been falsely implicated in the crime. Sections 42, 50 and 52-A of the NDPS Act have not been complied with. Compliance with

Section 50 of the NDPS Act is mandatory. Extracting the samples from the spot of the incident soon after the seizure is impermissible under Section 52A of the NDPS Act. Rule 8 of the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 ("Rules 2022", for short) has also been violated. The flowering tops were not segregated from leaves, seeds and stalks. Reading the definition of "ganja" under Section 2(iii)(b) of the NDPS Act, it has been argued that leaves, seeds and stalks ought to have been excluded while weighing seized Ganja. If it is not separated and weighed with leaves, seeds and stalks, the quantity could not be said to be commercial. The applicants had no *mens rea*.

7. In the case of applicants - Dinesh and Shahrukh Khan, bail has been claimed almost on similar grounds as in the above case.

8. The learned counsels for the applicants relied on the following cases:-

- (1) ***Union of India vs. Mohanlal and another, AIR OnLine 2016 SC 606;***
- (2) ***Mangilal Vs. State of Madhya Pradesh, Criminal Appeal No.1651 of 2023, decided on 12.07.2023 ;***
- (3) ***Subhash Baburao Patil vs. State of Maharashtra, Bail Application No.1363 of 2023 of this Bench, dated 24.08.2023.***

(4) *Ibrahim Khawaja Miya Sayyed @ Raju vs. State of Maharashtra, Bombay High Court at Principal Seat, B.A.No.1259 of 2022 dated 17.03.2023.*

9. Per contra, the learned A.P.P., opposing the applications, argued that compliance with Section 50 of the NDPS Act is essential only when the physical search is required. Other than a physical search, compliance with Section 50 of the NDPS Act is not required. In a case where the police officer suddenly found the accused carrying contraband, Section 42(1) of the NDPS Act is not mandatory. Section 42 of the NDPS Act will invoke if the police officer or concerned authority makes the search upon prior information. When such information or intimation comes to the notice of the Investigating Officer in the course of regular patrolling or an investigation of some other offence, it is not necessary to follow in all cases the conditions of Section 50 of the NDPS Act.

10. A question of the applicability of Section 50 of the Act falls for consideration.

11 In. ***Sk. Raju Alias Abdul Haque alias Jagga v State of West Bengal (2018) 9 SCC 708***, the ratio was that if the search is of both bags as well as the person of the accused, Section 50 of the NDPS Act would be attracted.

12. In ***Ranjan Kumar Chada v State of Himachal Pradesh 2022 Live Law (SC) 856*** relied on by the learned A.P.P., the question when notice under Section 50 of the Act was elaborated by referring to the earlier judgments, and it has been observed in paragraph 121 that “We do not propose to say any further as regards Sk. Raju (supra) as well as Baljindar Singh (supra). We adhere to the principles of law as explained by the Constitutional Bench in ***State of Punjab vs. Baldev Singh, (1996) 6 SCC 172*** and the Larger Bench answering the reference in ***State of Himachal Pradesh vs. Pavan Kumar, AIR 2005 SC 2265***.”

13. In ***Ranjan Kumar*** (supra), the facts were that the bag which the accused was carrying along with him was also searched with his personal search. However, the High Court of Himachal Pradesh, relying on the case of ***Pavan Kumar*** (supra) held that Section 50 of the NDPS Act is not at all applicable and the recovery of the contraband substance was not made as a result of the personal search of the accused but on account of search from the bag. Therefore, the police were not required to comply with Section 50 of the NDPS Act.

14. The Hon'ble Constitutional Bench in ***State of Punjab V Baldeo Singh (1999) 6 SCC 172***, held that Section 50 would come into play only in cases where a search of a person is

conducted under the NDPS Act as contemplated under Section 42. Where there is no search of a person under the NDPS Act, Section 50 would have no application. However, where in the course of a general search being conducted under Cr.P.C.1973 in connection with any offence or suspected offence except one under the NDPS Act, there is recovery of any contraband, the provisions of the NDPS Act shall forthwith apply in such cases also [Paragraph 44 of **Ranjan Kumar** (supra)].

15. **Vijaysinh Chandubha Jadeja v State of Punjab (2011) SCC 609** case was referred to the Full Bench since there was a diversion of the opinion of the Supreme Court in **Joseph Fernandes vs. State of Goa, (2000) 1 SCC 760, Prabha Shankar Dube vs. State of M.P. (2004) 2 SCC 56** on hand and **Krishna Kanwar vs. State of Rajasthan, (2004) 2 SCC 608**, on the other, with regard to the dictum laid down by Constitutional Bench of the Hon'ble Supreme Court, in **State of Punjab vs. Baldev Singh** (supra), particularly regarding the question, whether before conducting the search the police officer concerned is merely required to ask the suspect whether he would like to be produced before the Magistrate or Gazetted Officer for the purpose of search or is the suspect required to be made aware of the existence of the right in that behalf under law.

16. In paragraph No.4 of **Vijaysinh** (supra) it has been observed that the cases have come up before the Court for a limited purpose of clarification as to the interpretation of Section 50 of the NDPS Act by the Constitutional Bench in **Baldev Singh** (supra).

17. The question before the Court was whether Section 50 of NDPS Act casts a duty on the empowered officer to “inform” the suspect of his right to be searched in the presence of gazetted officer or a Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a gazetted officer can be said to be due compliance with the mandate of Section 50?

18. Answering the referred issue, it has been held, it is imperative on the part of the empowered officer to apprise the person intended to be searched of his right under Section 50 of the NDPS Act to be searched before a gazetted officer or a Magistrate. It is not necessary that information required to be given under Section 50 should be in a prescribed form or in writing, but it is mandatory that the suspect is made aware of the existence of his right to be searched before a gazetted officer or a Magistrate if so required by him and this mandatory provision requires strict compliance. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

19. It has been further observed that failure to “inform” the suspect about the existence of his said right would cause prejudice to him. Failure to comply with Section 50 would render the recovery of the illicit article from the suspect and vitiate the conviction if the same is recorded only on the basis of recovery of the illicit article from the person of the accused during such search. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and farce. The view of **Joseph Fernandes** (supra) was overruled.

20. In **Ranjan Kumar** (supra), the case of **Pavan Kumar** (supra) was considered. The said case was referred to the Larger bench since the bench had differed on the term “ person” used in Section 50 of the NDPS Act. In **Ranjan Kumar** (Supra) the answer to the referred issue was discussed. Paragraph No.10 of **Pawan Kumar** (supra) was reproduced, in which it has been observed that having regard to the scheme of the Act and the context in which it has been used in the Section, the “person” naturally means a human being or a living individual unit and not an artificial person. The word has been used in a broad common sense manner in which a normal human being will move about in a civilized society. Therefore, the most appropriated meaning of the word “person” appears to be – “the body of a human being as presented to public view usually with its appropriate coverings and clothings”. In a civilized society, appropriate coverings and clothings are

considered absolutely essential and no sane human being comes in a gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Lastly, it has been observed that the word "person" would mean a human being with appropriate coverings and clothings and also footwear. On the basis of these observations the Court held that the benefit of Section 50 of the NDPS Act cannot be extended to include bags or articles as the same may lead to an unworkable understanding of the provision.

21. The Hon'ble Supreme Court in **Ranjan Kumar** (supra) under head 'settling the conflicts between **Sk. Raju** and **Baljinder Singh** (supra)', in paragraph No.108 observed that the High Court of Delhi in **Akhilesh Bharti vs. State reported in 2020 SCC Online Delhi 306** had the occasion to look into the cleavage of opinion expressed in **Baljinder Singh** (supra) and **Sk. Raju** (supra). The High Court therein noted the thin line of distinction drawn by **Sk. Raju** (supra), where the contraband is recovered from an object which is held by the accused in his hand. In such a situation the High Court held that even if nothing is recovered from the person, Section 50 ought to be complied with. Then reproduced the findings of the Delhi High Court.

22. In **Sk. Raju** (supra), the Bench of three Judges held that where merely a bag carried by a person is searched without there being any search of his person, Section 50 will have no application, but if the personal search of the accused is also conducted, the provisions of Section 50 of the NDPS Act would wholly apply.

23. The Hon'ble Supreme Court in **Ranjan Kumar** (supra) in paragraph No.120 observed that in the facts of the present case, there is no scope of applying the ratio of **Paramanand** (supra) and **Sk. Raju** (supra). At the cost of repetition, we may state that in the case on hand, there is nothing to indicate that the search of the person of the accused was also undertaken along with a bag which he was carrying on his shoulder.

24. In paragraph No.121, it has been further observed that we do not propose to say anything further as regards **Sk. Raju** (supra) as well as **Baljinder Singh** (supra). We adhere to the principle of law as explained by the Constitutional Bench in Baldev Singh (supra) and the Larger Bench answering the reference in **Pawan Kumar** (supra).

25. The Hon'ble Supreme Court, in the case **Hamid Bhai Adam Bhai Malik vs. State of Gujrat, AIR 2009 SC 1378**, held that Section 42 would be invocable only if the search is made by the Police Officer or the concerned authority upon the prior information. When such information, intimation or knowledge

comes to the notice of the Investigating Officer in the regular patrolling or an investigation of some other offence, it is not necessary to follow the conditions incorporated in Section 42 of the NDPS Act in all cases. Where the police officer or concerned authority has prior information, intimation or knowledge, he has to seek authorization to enter the premises, search physically at any premises or vessel and seize the contraband, if any.

26. In the case of applicants Azim and Wajid, the police received the information while patrolling.

27. In the case of applicants Dinesh and another, the contraband was discovered while investigating the vehicular accident. In this situation, in view of the ratio laid down in the case of **Hamidbhai** (supra), authorization by a competent authority to conduct a search was not necessary.

28. The purpose of Section 50 of the NDPS Act is to apprise the accused of his right to have a search before the Gazetted Officer or the Magistrate. An option should be given to the accused of his right under Section 50 of the NDPTS Act. Then, it is his choice whether to exercise the right or not. The investigating Officer can seize the contraband where the accused denies exercising his right under the said Section. However, he should send to the Officer appointed under Section 53 of the NDPS Act.

29. In the case of applicants Azim and another, the contents of the notice are specific that the applicants were made aware of their right to be searched before the Gazetted Officer or Magistrate. However, they did not choose to be searched before the Officer or Magistrate. Reading the contents of the notice and endorsement with the signature of the applicants to have a search in the presence of the P.S.I. indicates that Section 50 of the NDPS Act has been complied with.

30. In the case of applicants Dinesh and another, the contrabands were seized from the dickey of the vehicle. Hence, Section 50 (1) of the NDPS Act does not apply.

31. The prosecution has vehemently argued that Sections 52-A of the NDPS Act has been complied with. There is no law prohibiting the drawing of samples immediately after the seizure from the spot of the incident. The contraband, which is a narcotic drug, is to be destroyed quickly. Its stock could not be stored till the conclusion of the trial. The procedure laid down in Section 52-A of the NDPS Act is to be followed for destruction purposes. It is just a procedure and not the mandate of law. Section 52-A of the NDPS Act speaks of the disposal of contraband, and for the purpose of identification of the contraband, samples are secured in the presence of the Magistrate. Those are used in the trial without producing the entire contraband. The Investigating Officer may

apply to the Magistrate under Section 52-A of the NDPS Act to certify the correctness of inventory so prepared or take the photographs of contraband/narcotic drugs in the presence of the Magistrate and to certify that such photographs as true; or allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

32. Section 52-A of the NDPS Act provides for the disposal of seized narcotic drugs and psychotropic substances. Section 52A of the NDPS Act has been crystalized in many cases. ***Union of India vs. Mohanlal*** (supra) was the landmark judgment on this Section. It has been held in paragraph No.13 that, "Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing the samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. The question of drawing of samples at the time of

seizure which, more often than not, takes place in the absence of the Magistrate, does not in the above scheme of things arise. This is so especially when, according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure....”.

33. The Rules 2022 were framed after the directions in ***Mohalal*** (supra). Those are in Chapter III with the title “Sampling”. Rule 8 provides for an application to the Magistrate. Reading Rules 8 and 9 together, it is clear that soon after the seizure of the material under the NDPS Act, it must be forwarded to the in charge of the nearest Police Station or to the Officer empowered under Section 53 of the Act, and such an officer shall on preparing the inventory move an application to the Magistrate under Sub-section (2) of Section 52A of the NDPS Act. The Investigating Officer shall ensure that the samples of the seized material are drawn in the presence of the Magistrate, and the same is certified by the Magistrate in accordance with the provisions of said sub-section. Rule 10 provides for drawing the samples in duplicate from each packet. Rule 11 provides for the quantity that should be drawn for sampling. Reading these Rules, it is crystal clear that soon after the seizure of the contraband, the Investigating Officer has no

power to draw the samples on the spot of the incident or the place where the contraband is seized. He has to send it after sealing to the officer authorized under Section 53 of the said Act.

34. The Hon'ble Supreme Court in ***Simaranjit Singh V State of Punjab, 2023 Live Law (SC) 570***, held that drawing samples at the time of seizure is not in conformity with the law laid down in Mohanlal (Supra).

35. The case of ***Mukesh Rajaram Chaudhari v State of Maharashtra, 2023 All M.R. (Cri) 3688*** was based on the fact that the contraband was seized before Rules 2022. The Court discussed about Rules 2022 in paragraphs 15 and 16 and observed that there was no need to send the samples which were drawn before the Magistrate to the Chemical Analyser prior to Rules. Now, the rules have cleared the controversy. Hence, this case would not assist the learned A.P.P.

36. In ***Ibrahim Khawaja Miya Sayyed*** (Supra) the definition of the term 'Ganja' under section 2 (iii) (b) has been considered. It means the flowering or fruiting tops of the Cannabis Plant, excluding the seeds and leaves when not accompanied by the tops), by whatsoever name they may be known or designated. A plain reading of this Section would reveal seeds and leaves not be covered under the definition of 'ganja' unless they are accompanied by flowering or fruiting tops. The fact that the entire

substance was weighed together without quantifying the weight of the flowering and fruiting tops, casts doubt whether 'Ganja' seized from the applicant was the quantity as to attract provision under section 20(c) of the Act.

37. The above view is reiterated in a series of the judgments of this High Court, and doubt has been raised on the actual quantity of the Ganja giving such benefits, the rider of Section 37 of the NDPS Act, has also not been applied. Similar was the condition in the cases at hand. Without segregating the flowering or fruiting tops from seeds, leaves, and stems, the contraband recovered was weighed. Therefore, there was scope to doubt whether section 22(C) of the Act would apply.

38. On examining the facts, it is apparent that Section 52A of the NDPS Act, read with Rules 8, 9, and 10 of the Rules 2022, are not strictly followed. Hence, the applicants deserve bail.

ORDER

- i) The bail applications are allowed.
- ii) Applicants (1) Azim s/o Jafar Qureshi and (2) Wajid s/o Kalim Qureshi in B.A.No.109 of 2024 and) Dinesh s/o Bhawarlal Chaudhary (Jat) and Sharukh Khan Jakir Khan Pathan in B.A.No.914 of 2024, on furnishing PB and SB of Rs.50,000/-, with one local solvent surety of the like amount each, in the above crimes for the aforesaid offence, on the conditions

that,

- (a) they should furnish their residential proofs and cell phone numbers to the Investigating Officer with an undertaking that they would not change them till the conclusion of the trial;
- (b) they should not leave their residence without prior permission of the Court;
- (c) they should not involve in similar crimes;
- (d) they should attend the trial on each and every effective date.

(S. G. MEHARE)
JUDGE

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