



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

924 BAIL APPLICATION NO. 1356 OF 2023

Mangilal Barku Pawara

..APPLICANT

VERSUS

The State of Maharashtra

..RESPONDENT

Advocate for Applicant : Mr. Deshpande Chaitanya Chandrakant.
APP for Respondent/State : Mrs. Pratibha J. Bharad

.....

**CORAM : SANJAY A. DESHMUKH, J.
DATED : 11th JANUARY, 2024.**

PER COURT :-

1. The applicant is seeking bail in connection with crime No.43 of 2020 registered with Shirpur Taluka Police Station, Dist. Dhule, for the offences punishable under Sections 20(b) (2)(C), 22(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985.

2. It is averred in the report dated 16th June, 2020 that informant API of Shirpur Taluka Police Station was called by LCB Officer informing that he got secret information that the applicant has collected Ganja beside his house in the field adjacent to it. The raid was effected at about 3.20 p.m. The police officials identified the applicant. There was a heap of leaves of green colour, seeds and husk of twigs covered under several plastic gunny bags. It was 30.500 kilograms in one bag. There were 128 bags. Total Ganja was

3904 kilograms. It was seized under seizure panchanama.

3. The learned advocate for the applicant submitted that earlier Bail Application No. 147 of 2022 was decided on 17th March, 2022. The application was rejected. This Court called report from the trial Court, however, the trial Court expressed inability to decide the case as early as possible as there are 44 witnesses. The learned advocate for the applicant submitted that the procedure as contemplated under section 52A is not followed and therefore, trial vitiates. He prayed for granting bail on this technical ground. He also pointed out the order passed by this Court on different grounds. He prayed for bail on the ground of delay caused for trial. He lastly pointed out that mandatory compliance of section 52A of NDPS Act is not done by the investigation officer.

4. The learned APP for the respondent/State strongly opposed the application. It is submitted that huge amount of Ganja has been seized and samples were seized in presence of Gazetted Officer. The learned APP is relying upon the following authoritative:

- a) ***Govind s/o Ramjilal Agrawal & anr. Vs. State of Maharashtra, 2002 All M.R. (Cri.) 869;***
- b) ***Union of India Vs. Ram Samujh, 1999 (9) SCC 429;***
- c) ***Superintendent, Narcotics Central Bureau, Chennai Vs. R. Paulsamy, 2000 AIR (SC) 3661.***

In ***Govind s/o Ramjilal Agrawal*** (supra) this Court in para 20 held as under:

“20. Besides this, the Apex Court in Superintendent, Narcotics Central Bureau, Chennai v. R.Paulsamy (supra) has with reference to contentions relating to violation of Sections 52 and 57 and consideration of the same at the bail stage laid down that compliance of Sections 52 and 57 is a matter which could be establish only at trial and could not be prejudged at the stage of consideration of bail. It is pertinent to note that the Apex Court has pointed out that minimum which the lower Court should have taken into account was the factual presumption in law position that official acts have been regularly performed and such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the Court during bail stage regarding the compliance of the formalities mentioned in those two sections. The Constitution Bench in State of Punjab v. Baldev Singh (supra) without expressing any opinion as to whether the provisions of Section 50 are mandatory or not, but bearing in mind the purpose for which the safeguard has been made has held that the provisions of Section 50 of the Act implicitly make it imperative and obligatory and cast a duty on the investigating officer to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50, by intimating to the person concerned about the existence of his right, that if he so requires, he shall be searched before a gazetted officer or a

Magistrate and if he so opts, failure to conduct his search before a gazetted officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act. The Constitution Bench of the Apex Court has in categorical terms pointed out that the question whether or not the safeguards provided in Section 50 were observed would have, however, to be determined by the court on the basis of the evidence led at the trial and the finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. It is pertinent to note that the Apex Court has further pointed out that without giving an opportunity to the prosecution to establish at the trial that the provisions of Section 50 and, particularly, the safeguards provided in that section were complied with, it would not be advisable to cut short a criminal trial.”

In ***Union of India*** (supra), the Honourable Supreme Court in para 8 held as under:

“(8) TO check the menace of dangerous drugs flooding the market, the Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that accused is not guilty of such offence; and (ii) that he is not likely to commit while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in the dangerous drugs, the Court should implement the law in the spirit with which the Parliament, after due deliberation, has amended.”

In ***Superintendent, Narcotics Central Bureau, Chennai Vs.***

R. Paulsamy (supra), the Honourable Supreme Court in para 6 held as under:

“6. In the light of Sec. 37 of the Act no accused can be released on bail when the application is opposed by the public prosecutor unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that matters which could be established only in offence regarding compliance with Secs. 52 and 57 have been pre-judged by the learned single Judge at the stage of consideration for bail. The minimum which learned single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no

document has been produced before the learned single Judge during bail stage regarding the compliance of the formalities mentioned in those two sections.”

5. The learned advocate for the applicant pointed out the case of ***Yusuf @ Asif Vs. State (Criminal Appeal No.3191 of 2023 [Arising out of SLP (Cri.) No.3010 of 2023])***, in which the Honourable Supreme Court in paras 13 and 16 held as under:

“**13.** Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under sub-sections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of subsection (2) of Section 52A of the NDPS Act.

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.”

Nobody will dispute the ratios and guidelines laid down in the precental law cited supra by both sides. However, facts of the case are always decisive.

6. Perused the report and charge-sheet. As far as non-compliance of Section 52A of the N.D.P.S. Act is concerned, it reveals that the samples were taken in the presence of the Executive Magistrate, who was accompanied with the Police during the raid. As per section 52A sub-section (2)(c) samples are to be collected in the presence of Magistrate. He has to certify its correctness, list of samples must be drawn. This mandatory course of action is not followed by the Investigating Officer. It vitiates the trial, because samples were collected in the presence of same Magistrate, who was present at the time of raid. Thus, it becomes unfairness on the part of investigating officer. Therefore, the authorities relied upon by the learned APP cited supra are not helpful for the State. The applicant has made out the case as per Section 37 (1)(ii) of the NDPS Act for granting bail. This Court is satisfied that there is reasonable ground for believing that applicant is not guilty. Further, the applicant has no criminal antecedents, therefore, there is no possibility that he will commit any offence while on bail. If he commits such offence, his bail can be cancelled. The applicant has no criminal

antecedents. He has roots in the society. He will not flee from trial. The trial would take long period. The application, therefore, deserves to be allowed on certain conditions. Hence the following order :

ORDER

- I. Application is allowed.
- II. The applicant in connection with crime No.43 of 2020 registered with Shirpur Taluka Police Station, Dist. Dhule, for the offences punishable under Sections 20(b) (2)(C), 22(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985, be released on bail on furnishing personal bond of Rs.1,00,000/- with one and two sureties of the like amount on following conditions:-
 - a) The applicant shall not tamper with the prosecution evidence and shall not pressurize the prosecution witnesses, in any manner.
 - b) The applicant shall not leave the jurisdiction of Dhule district without prior permission of the learned trial Court.
 - c) The applicant shall not indulge in similar activities again.
 - d) The above observations are prima facie in nature and the trial Court shall not be influenced by it.

(SANJAY A. DESHMUKH, J.)