

UDAY
SHIVAJI
JAGTAP
Digitally
signed by
UDAY
SHIVAJI
JAGTAP
Date:
2024.04.03
18:23:18
+0530

Uday S. Jagtap

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

CRIMINAL BAIL APPLICATION NO. 121 OF 2022

Mohammad Irshad Abdul Rahman .. Applicant

Vs.

The State of Maharashtra .. Respondent

.....

Mr. Ajinkya Badar a/w Ms. Sampada Junnare Badar i/b Ninad Shinde for the applicant

Ms. Anamika Malhotra, APP for the respondent – State

Mr. S.L. Bhandwalkar, PSI, Sinhgad Road Police Station present

.....

CORAM : PRITHVIRAJ K. CHAVAN, J.

Closed on : 1st April, 2024.

Pronounced on : 3rd April, 2024

P.C.

1. By this application, the applicant prays for his release on bail, who is being prosecuted by Sinhagad Police Station in respect of C.R. No.2673 of 2020 for the offence punishable under Sections 8(c), 20(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act).

2. Briefly stated the prosecution story goes as follows.

3. On 30.12.2020, Mr. Kuldeep Sankpal, PSI attached to the

Sinhagad Police Road Police Station and the First informant along with his superior officer namely Mr. Devidas Gheware, Senior Police Inspector and other personnel were on patrolling duty equipped with all the paraphernalia required for conducting search and seizure of contrabands. They were patrolling in a government vehicle bearing Registration No. MH-14-CL-1597.

4. Around 15:00 hours, when the team reached ahead of Tukainagar Chowk in Vadgoan Budruk, Mr. Devidas Gheware asked the driver to stop the vehicle and to park it by the side of the road. The entire team alighted and started walking along with all the equipment and instruments required for conducting seizure and search of the contraband towards Venutai Chavan Sinhagad College. The team suddenly noticed a person with suspicious movements in front of hotel Royal Jagdamb, adjacent to Bhansali Campus Housing Society. He was sitting on a Honda Dio moped. When he was intercepted, he tried to flee away. However, the team apprehended him. Upon inquiry, it revealed that he was the applicant who was carrying a contraband called Mephedrone (MD).

5. The raiding team issued him a notice under Section 50 of the

NDPS Act and thereafter his personal search was conducted in the presence of panch witnesses. During search, he was found in possession of a packet in a transparent plastic bag containing white crystalline powder. It was 63 grams of white crystalline powder. As usual, two samples of 5 grams each from the said contraband was seized for forwarding to the Forensic Science Laboratory. The applicant was arrested on 30.12.2020. After completing the investigation, a charge-sheet came to be filed.

6. I heard Mr. Badar, learned Counsel for the applicant and Mrs. Malhotra, learned APP at a considerable length.

7. At the outset, Mr. Badar, learned Counsel for the applicant would argue that the prosecution case would not stand even for a moment in view of flagrant breach of Section 50 of the NDPS Act. Apart from the fact that the applicant was just 23 years of age at the time of his arrest with no antecedents to his discredit, learned Counsel would urge to release him on bail as he has been incarcerated for more than 3 years. He would further invite my attention to the fact that conduct of the applicant is also material in the given set of facts and circumstances, which would entitle him to

be released on bail. He has placed reliance on multiple decisions of the Supreme Court and various High Courts, however, I would refer only a few which are relevant in the given circumstances.

8. Learned APP, on the other hand, would argue that in so far as non-compliance of Section 50 of the NDPS Act is concerned, she would have nothing to say much. Nevertheless, she placed reliance on a decision of the Supreme Court in case of *State of Himachal Pradesh Vs. Sunil Kumar, (2014) 4 SCC 780* by contending that even if it is a “chance recovery” which may not be on prior information or on the ground of “reason to believe”, or even if it is “positive suspicion” or “grave suspicion”, it cannot be equated with “reason to believe”. I shall distinguish the ratio, laid down, hereinafter.

9. It is quite apparent from the notice under Section 50 of the NDPS Act that the Investigating Officer was already aware of the contraband Mephedrone (MD) being carried by the applicant at the time of giving notice and even before his person was searched. The very wordings in the said notice reads thus:-

“You have placed Mephedron (MD) with yourself

to sell the amilite. That is why you have to search”.

10. It is surprising how did the Investigating Officer, in advance was aware about the alleged contraband being carried by the applicant even before his search was conducted and notice was served upon him. Surprisingly, the prosecution has no answer. Another glaring aspect of the notice under Section 50 of the NDPS Act is that even though the applicant appears to be studied till 12th standard, his thumb impression appears to have been obtained over the notice under Section 50 of the NDPS Act, which has not been attested by the police officer. Learned APP would argue that the applicant had also put his initials over the said notice acknowledging the receipt of the same but had not satisfied as to why the Investigating Officer was required to obtain the unattested thumb impression of the applicant if he could sign it. It is doubtful whether, in fact, it was the thumb impression of the applicant *sans* due attestation.

11. Mr. Badar is justified in placing implicit reliance upon a latest judgment of the Supreme Court in the case of **Rajan Kumar Chadha Vs. State of Himachal Pradesh, 2023 SCC online SC 1262.**

It would be advantageous to extract para 66 of the judgment, which reads thus :-

“66. From the aforesaid discussion, the requirements envisaged by Section 50 can be summarised as follows:—

(i) Section 50 provides both a right as well as an obligation. The person about to be searched has the right to have his search conducted in the presence of a Gazetted Officer or Magistrate if he so desires, and it is the obligation of the police officer to inform such person of this right before proceeding to search the person of the suspect.

(ii) Where, the person to be searched declines to exercise this right, the police officer shall be free to proceed with the search. However, if the suspect declines to exercise his right of being searched before a Gazetted Officer or Magistrate, the empowered officer should take it in writing from the suspect that he would not like to exercise his right of being searched before a Gazetted Officer or Magistrate and he may be searched by the empowered officer.

(iii) Before conducting a search, it must be communicated in clear terms though it need not be in writing and is permissible to convey orally, that the suspect has a right of being searched by a Gazetted Officer or Magistrate.

(iv) While informing the right, only two options of either being searched in presence of a Gazetted Officer or Magistrate must be given, who also must be independent and in no way connected to the raiding party.

(v) In case of multiple persons to be searched, each of them has to be individually communicated of their right, and each must exercise or waive the same in their own capacity. Any joint or common communication of this right would be in violation of Section 50.

(vi) Where the right under Section 50 has been exercised, it is the choice of the police officer to decide whether to take the suspect before a Gazetted Officer or Magistrate but an endeavour should be made to take him before the nearest Magistrate.

(vii) Section 50 is applicable only in case of search of person of the suspect under the provisions of the NDPS Act, and would have no application where a search was conducted under any other statute in respect of any offence.

(viii) Where during a search under any statute other than the NDPS Act, a contraband under the NDPS Act also happens to be recovered, the provisions relating to the NDPS Act shall forthwith start applying, although in such a situation Section 50 may not be required to be complied for the reason that search had already been conducted.

(ix) The burden is on the prosecution to establish that the obligation imposed by Section 50 was duly complied with before the search was conducted.

(x) Any incriminating contraband, possession of which is punishable under the NDPS Act and recovered in violation of Section 50 would be inadmissible and cannot be relied upon in the trial by the prosecution, however, it will not vitiate the trial in respect of the same. Any other article that has been recovered may be relied upon in any other independent proceedings.”

12. There is one more striking aspect. It appears that overleaf the notice under Section 50, the applicant himself, under his hand, appears to have written that he did not want to be searched in the presence of a Gazetted Officer or Magistrate. If the applicant was so literate who could write in such a modest language then why the Investigating Officer deemed it proper to obtain his thumb impression? Even the panchanama indicates that before service of notice under Section 50 of the NDPS Act, the applicant was informed that he was in possession of Mephedrone (MD) for the purpose of sell and, therefore, the raiding team wanted to effect his search.

13. One of the important feature as envisaged in Section 50 of the NDPS Act is that it is applicable only in case of a search of the person suspected under the provisions of the NDPS Act and would have no application where search was conducted under any other statute in respect of any offence. Equally, the burden is on the prosecution to establish that Section 50 of the NDPS Act was duly complied with before search was conducted.

14. One more important requirement of Section 50 of the NDPS

Act is that any incriminating contraband, possession of which is punishable under the NDPS Act and recovered in violation of Section 50 would be inadmissible and cannot be relied upon in the trial by the prosecution, however, it will not vitiate the trial in respect of the same.

15. The prosecution indeed, in the case at hand, had breached the spirit of Section 50 of the NDPS Act since the Investigating Team already knew not only the contraband but its chemical name even before conducting the search. In view of the ratio laid down by the Supreme Court in case of *Rajan Kumar Chadha* (supra), the applicant needs to be released on bail apart from the fact of his long incarceration for more than 3 years. It is needless to refer various decisions of this Court and the Supreme Court on the identical circumstances where the applicants accused were released on bail only on the ground of long incarceration without any hope of bringing the trial to its logical end.

16. Turning to the decision in case of *Sunil Kumar* (supra) pressed into service by the learned APP wherein the Supreme Court elucidated “chance recovery”, “prior information”, “reason to

believe”, “suspicion” and “positive suspicion” – its meaning in view of Section 8, 14 and 15 of the Evidence Act. The relevant paragraphs are extracted below :-

“13. The expression “chance recovery” has not been defined anywhere and its plain and simple meaning seems to be a recovery made by chance or by accident or unexpectedly. In Mohinder Kumar V. State (1998) 8 SCC 655, this Court considered a chance recovery as one when a police officer “stumbles on” narcotic drugs when he makes a search. In Sorabkhan Gandhkhan Pathan V. State of Gujarat (2004) 13 SCC 608 the police officer, while searching for illicit liquor, accidentally found some charas. This was treated as a “chance recovery”.

14. Applying this to the facts of the present appeal, it is clear that the police officers were looking for passengers who were travelling ticketless and nothing more. They accidentally or unexpectedly came across drugs carried by a passenger. This can only be described as a recovery by chance since they were neither looking for drugs nor expecting to find drugs carried by anybody.

15. It is not possible to accept the view of the High Court that since the police officers conducted a random search and had a “positive suspicion” that Sunil Kumar was carrying contraband, the recovery of charas from his person was not a chance recovery. The recovery of contraband may not have been unexpected, but the recovery of charas certainly was unexpected notwithstanding the submission that drugs are easily available in the Chamba area. The police officers had no reason to believe that Sunil Kumar was carrying any drugs and indeed that is also not the case set up in this appeal. It was plainly a chance or accidental or unexpected recovery of charas – Sunil Kumar could well have been carrying any other contraband such as smuggled gold,

stolen property or an illegal firearm or even some other drug.”

17. I am afraid the ratio laid down in this case would not be of any assistance to the prosecution for the following reasons; firstly there was no question of “suspicion”, “positive suspicion” or “grave suspicion” for the simple reason that even before serving the notice under Section 50 of the NDPS Act, the raiding team already knew that the applicant was in possession of Mephedrone (MD) which he was intending to sell. They had reason to believe about the possession of the contraband on the person of the applicant. Of course, “positive suspicion” or “grave suspicion” cannot be equated with “reason to believe” as stated in the said judgment which are completely different concepts. It is quite apparent that only because of “reason to believe” that led to recovery of the contraband from the person of the applicant otherwise, there was no reason for the raiding team to intimate the applicant in advance as to what contraband he was carrying and for what purpose. No procedure appears to have been followed by the Investigating Agency as contemplated in the NDPS Act. They were already patrolling with all the equipments required for search and seizure of contraband. The facts in the case of *Sunil Kumar* (supra), therefore, can be

distinguished as it was a “chance recovery” of a narcotic substance, while checking for ticketless passengers from the bus and, therefore, there is no requirement of compliance of Section 50 of the NDPS Act.

18. Corollary of the discussion hereinabove is that the application needs to be allowed.

19. Now to the order :-

ORDER

(a) The application is allowed.

(b) The applicant be released on executing a P.R. bond in the sum of Rs.25,000/- with one surety in the like amount to the satisfaction of the trial Court in Special NDPS Case No.293 of 2021 in connection with C.R. No.2673 of 2020 registered with Sinhagad Police Station for the offence punishable under Section 8(c), 20(b) of the NDPS Act.

(c) The applicant shall report Sinhagad Road Police Station, Pune on first Sunday of every month between 10.00 a.m. to 1.00 p.m. till charge is framed.

(d) After framing the charge, the applicant shall

attend each date in the trial Court scrupulously.

(e) The applicant shall not tamper with the evidence or attempt to influence or contact any of the witnesses or persons concerned with this case.

(f) The applicant shall furnish his residential address and contact details forthwith to the respondent and the Special Court. The applicant shall inform in case of any change in his contact details or residential address to the respondent as well as the Special Court.

(g) In case of two consecutive defaults either in attending the respondent or the trial Court or in case of breach of any of the aforesaid conditions, the prosecution shall be at liberty to seek cancellation of his bail.

20. The application stand disposed of in the aforesaid terms.

(PRITHVIRAJ K. CHAVAN, J.)