

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.59 OF 2024

Afroz Ali Salim Shaikh ...Applicant
vs.
The State of Maharashtra ...Respondent

Ms. Lochan Chandka, for the Applicant.
Mr. Tanveer Khan, APP, for the Respondent/State.
Mr. Dhananjay Chavan, API, Mumbra police station.

CORAM : N. J. JAMADAR, J.

DATE : APRIL 24, 2024

P.C.:

1. Heard the learned counsel for the applicant and the learned APP for the State.
2. The applicant, who is arraigned in C.R. No. 383 of 2023 registered with Mumbra police station for the offences punishable under sections 22(a) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act, 1985) seeks to be enlarged on bail.
3. On 9th April, 2023 while Mumbra police were on patrolling duty particularly to restrict the illicit trade of drugs at Mumbra. They came across a auto-rickshaw bearing No. MH-03-CR-1947 wherein two persons were sitting with two boxes on their laps in suspicious circumstances. They were accosted. They identified themselves as Kadirali Ansari (A1) and Afroz Ali Shaikh, the applicant herein. In the search of the boxes, in the presence of

panch witnesses 120 bottles each of Chlorpheniramine and Codeine Phosphate Syrup 100 ml manufactured by S-Kuf were found. The applicant and the co-accused disclosed that they had acquired the said contraband from Sourabh Rastogi, an absconding accused. The applicant came to be arrested.

4. Ms. Chandka, the learned counsel for the applicant, submitted that the applicant was allegedly carrying boxes on which QR code of DTDC company was printed. The boxes were also sealed with the cello tape of DTDC company. The name of the consignor and consignee were also mentioned thereon. In these circumstances, the applicant cannot be said to have been found in conscious possession of the allegedly seized contraband article. Secondly, it was submitted that the seizure and the sampling stood completely vitiated. Out of 180 bottles, only one bottle was collected by way of sample (A1). No inventory was conducted before the jurisdictional Magistrate. Even CA report has not been received for a long time. In these circumstances, further detention of the applicant would be wholly unwarranted.

5. In opposition, Mr. Khan, the learned APP resisted the prayer for bail. It was submitted that there is material to show that the applicant and the co-accused were apprehended along with contraband substance during the course of a patrolling operation.

The circumstances in which the applicant was found carrying the boxes containing the contraband substance indicate that the applicant was in conscious possession of the said substance. Therefore, as the interdiction contained in section 37 of the NDPS Act, 1985 comes into play, the applicant does not deserve to be enlarged on bail.

6. I have perused the report under section 173 of the Code of Criminal Procedure, 1973 and the material on record. The seizure panchanama makes it explicitly clear that when the police party accosted the applicant and the co-accused, they were allegedly carrying boxes on which the name and QR code of DTDC company were printed. Likewise, the names of consignee and consignor were also found mention on the said boxes, which were in a sealed state. Upon being opened, 120 bottles of Chlorpheniramine and Codeine Phosphate Syrup were found. One of the bottles was collected by way of sample (A1). The said sample, it seems, was sent for analysis to the Director of Food and Drug Administration vide letter dated 8th May, 2023. Prima facie, it does not appear that the inventory was conducted before the Magistrate as mandated under section 52A of the NDPS Act, 1985.

7. It further appears that there is an element of delay in forwarding the sample (A1) for analysis. As is evident from the

forwarding letter (page 40), the sample which was collected at the time of the alleged seizure on 9th April, 2023 was forwarded to the Director of Food and Drug Administration on 8th May, 2023. What further exacerbates the situation is the fact that the Food and Drug Administration seems to have received the said sample on 12th June, 2023. The said endorsement further dents the case of the prosecution as the aspect of safe keeping of the sample so that it could not have been tampered with, arises for consideration at the trial.

8. In any event, the mandate contained in section 52A of the NDPS Act, 1985 does not seem to have been followed. The very sample (A1) which was collected at the time of alleged seizure was forwarded to the Director, Food and Drug Administration. The report of analysis is based on the samples which were collected at the time of alleged seizure and in one which was collected before the learned Magistrate. The legal position has crystallized to the effect that the provisions contained in NDPS Act, 1985 do not envisage, that the sample be collected at the time of seizure of the contraband articles. Absence of inventory before the Magistrate under section 52A of the NDPS Act, 1985 results in an situation of absence of primary evidence and the report of analysis based on the sample not collected before the Magistrate is held to be bereft of any

evidentiary value.

9. A profitable reference in this context can be made to the decision of the Supreme Court in the case of Union of India V/s. Mohanlal and Anr.¹, wherein the Supreme Court held that the procedure prescribed in Section 52-A is of mandatory nature and it was obligatory to prepare an inventory of seized contraband and then make an application to the Magistrate for the purpose of getting its correctness certified.

10. In the case of Yusuf @ Asif V/s. State², the Supreme Court after following the decision in the case of Union of India V/s. Mohanlal (supra), enunciated, as under:

“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.”

11. In the case of Simaranjit Singh V/s. State of Punjab³, the Supreme Court after extracting the observations in paragraphs 15 to 17 (extracted above) in the case of Union of India V/s. Mohanlal (supra), observed that the act of the officer drawing samples from all the packets at the time of seizure is not in conformity with the

1 (2016) 3 SCC 379

2 Cri.Appeal 3191 of 2023 Dt.13/10/2023.

3 2023 SCC Online SC 906.

law laid down by Supreme Court in the case of Mohanlal (supra). That creates a serious doubt about the prosecution case that substance recovered was a contraband, and the Supreme Court, thus, set aside the judgment of conviction and sentence. At any rate, the prosecution case rests on the C.A report based on the analysis of the sample collected at the time of alleged seizure. In the case of **Mohd. Khalid** (supra), the Supreme Court observed, inter alia, as under:-

22] Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report(Exhibit P-11) is nothing but a waste paper and cannot be read in evidence. The accused A-3 and A-4 were not arrested at the spot. The offence under Section 20(b)(ii)(c) deals with production, manufacture, possession, sale, purchase, transport, import or export of cannabis. It is not the case of the prosecution that the accused A-3 and A-4 were found in possession of ganja. The highest case of the prosecution which too is not substantiated by any admissible or tangible evidence is that these two accused had conspired sale/purchase of ganja with A-1 and A-2. The entire case of the prosecution as against these two accused is based on the interrogation notes of A-1 and A-2.

(emphasis supplied)

12. In view of the aforesaid enunciation of law, in the absence of proceedings under section 52A of the NDPS Act, 1985 having been completed in the manner ordained by law, the prosecution has to surmount the impediment of non-compliance of the section 52-A of the NDPS Act, 1985. The aspect as to whether the applicant was in conscious possession of the contraband substance in the

circumstances of the case, also warrant adjudication at the trial.

13. I am thus persuaded to hold that interdict contained in section 37 of the NDPS Act, 1985 may not be attracted. The Court may thus be justifiably draw an inference that the applicant may not be guilty of the offence under section 22(c) of the NDPS Act, 1985. The Court is not informed that the applicant has antecedents. A further inference that the applicant may not indulge in identical offences if released on bail, may become justifiable.

Hence, the following order.

ORDER

1] The application stands allowed.

2] The applicant be released on bail in C.R. No. 383 of 2023 registered with Mumbra police station on furnishing a P.R. Bond of Rs. 1,00,000/- with one or more sureties in the like amount.

3] The applicant shall mark her presence at Mumbra police station on the first Monday of every month between 11 am to 1 pm for a period of three years or till conclusion of the trial, whichever is earlier

4] The applicant shall not tamper with the prosecution evidence and give threat or inducement to first informant, any of the prosecution witnesses or any person acquainted with the facts of the case.

5] The applicant shall furnish her contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.

6] The applicant shall regularly attend the proceedings before the jurisdictional Court.

7] By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N. J. JAMADAR, J.)