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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.182 OF 2024

Bilal Changesh Khan	]	..	Applicant
vs.			
Union of India & Anr.	]	..	Respondents

Mr.Anil Lalla a/w Aryan Kotwal i/b Lalla & Lalla for the Applicant.
Ms.Mahalaxmi Ganpathi, APP for the State.

CORAM : BHARATI DANGRE, J

DATE : 10th April, 2024.

P.C.

1] This is the third Bail Application filed by the Applicant, who is accused of being in conscious possession of 52 gram Mephedrone and pursuant thereto he is arrested on 15.12.2020.

2] I have heard the learned counsel Mr. Lalla for the Applicant and Ms. Mahalaxmi Ganpathi for the State.

Mr. Lalla would submit that apart from the incarceration of the Applicant for more than 3 years, the prosecution case suffer from a major flaw i.e. non compliance of Section 52A of the The Narcotic Drugs And Psychotropic Substances Act, 1985 (for short "NDPS Act")

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and he would place reliance upon the evolution of the law on this aspect

He has also placed reliance upon various orders passed by this Court as well as the orders passed by the Hon'ble Apex Court, enlarging the accused persons, pending the trial, on bail, on the ground of violation of safeguard provided in Section 52A of the NDPS Act.

The learned APP do not dispute the factual aspect, that in the present case, there is no compliance of Section 52A of the NDPS Act and she would, therefore, request the Court to pass an appropriate order.

3] The case of the prosecution is, that on 15.12.2020, Malwani Police Station received an information about sale of contraband i.e. Mephedrone by a person aged about 25 to 30 years. Accordingly a trap was laid, which lead to one Shahrukh Shafiq Shaikh, who was found in suspicious condition and waiting for someone at Jankalyan Nagar Marg, Malwani, Malad (West), Mumbai and upon following necessary procedure, his personal search was carried out and he was found in possession of 5 Grams of Mephedrone.

It is this accused who lead to the present Applicant, when he disclosed that he had procured the Mephedrone from the present Applicant Bilal, who was sitting in an auto-rickshaw at some distance.

The team, therefore approached Bilal Khan, who was apprehended and upon search, he was found to be in possession of 52 Grams of Mephedrone, which admittedly is commercial quantity.

This resulted in registration of CR No. 180/2020 with Malwani Police Station, by invoking Section 8(c), 22(c) and 29 of the NDPS Act.

Since the date of his arrest, the Applicant remains incarcerated. The investigation established that the seized quantity is Mephedrone and report of the Chemical Analysis is now placed before the Court, though it was not available at the stage of filing of charge-sheet.

4] The Applicant approached this Court in the year 2022 and pressed into service various grounds including non-compliance of Section 50 of the NDPS Act and it was also submitted that Accused No.1 who was found with 5 Gram of Mephedrone, is already released on bail and it was also his insistence that 52 Grams is not the correct reflection of the quantity of Mephedrone seized from him, as it is weighed alongwith the plastic pouch and since it was the case on border line, rigors of Section 37 of the NDPS Act, would not apply.

Another ground pressed into service was, on completion of investigation charge sheet is filed and his arrest is unnecessary.

5] On 17.08.2022, on expressing my disinclination to entertain the

Application in the wake of the material compiled in the charge sheet against the Applicant, the counsel representing the Applicant sought withdrawal of the Application and hence the Application was disposed off as withdrawn.

Once again, he approached the Special Judge for NDPS cases, who, by order dated 22.12.2022 rejected the Bail Application, though the non-compliance of Section 50 of the Act was pressed into service alongwith the ground of his incarceration for nearly two years, without charge being framed.

6] The Applicant, for the second time approached this Court by filing Criminal Bail Application No.96/2023 and when I specifically inquired about the change in circumstances, the argument advanced was, there are none and since he attempted to agitate the Application on merits, by pressing the same grounds which were already considered by me in the earlier round, the Application was dismissed, though liberty was reserved in him, to move the Court if the trial did not progress.

7] Mr. Lalla, now has pressed into service an additional ground which was not argued before the Courts earlier, being the lacunae in the case of the prosecution, as there is no compliance of Section 52A

of the NDPS Act, as the sampling of the seized Mephedrone was not conducted in presence of the Metropolitan Magistrate and this sample drawn before the Magistrate was not forwarded to the chemical examiner for analysis and report.

I must note that this point was not argued in the earlier rounds nor was it deliberated upon.

8] In the case of Union of India vs. Mohanlal & Anr. (2016) 3 SCC 379, the Apex Court had issued guidelines regarding the manner in which the sample of the seized contraband should be drawn and the provisions of Section 52A of the NDPS Act, were held to be mandatory in nature with special emphasize on sub-section(8).

Subsequent thereto, the Apex Court in case of Yusuf @ Asif vs. State (Criminal Appeal No.3191 of 2023), as well as in the case of Simranjit Singh vs. State of Punjab (Special Leave to Appeal (Cri) No. Criminal Appeal No.1958 of 2023), has held that the non compliance of Section 52A is fatal to the prosecution and it is held that the samples drawn and certified by the Magistrate in compliance with sub-section (2) and sub-section (3) of Section 52A of the NDPS Act, constitute primary evidence for the purpose of trial and there is no provision in the NDPS Act, which mandate drawing of the sample at the time of seizure.

The Apex Court in the aforesaid two decisions has set aside the conviction, by recording that the case of the prosecution is not free from suspicion as it is not established beyond reasonable doubt, as the seizure is not in conformity with the law laid down in case of Mohanlal (*supra*), which created serious doubt about the case of the prosecution, that the substance recovered was contraband.

9] A series of decisions in cases, where there is no compliance of Section 52A are placed before me and I have taken note of the fact that violation of Section 52A of the NDPS Act has been construed to be a lacunae in all these cases and the persons who are found in possession of the contraband are directed to be enlarged on bail, for the non-compliance of the mandatory provision.

The rigors of Section 37 of the NDPS Act which require the Court to take into account the relevant factors, as to whether there are reasonable grounds to hold that the accused is not guilty of the offence and that he is not likely to commit offence on bail, as far as the former is concerned, since there is no adherence to the statutory provision, there are reasonable grounds to hold that the Applicant is not guilty of the offence and since no antecedents are reported against the present Applicant, I am inclined to release him on bail, pending the trial.

Apart from this, the long incarceration, with no progress in trial

also make the Applicant entitled for being released on bail, pending the trial.

Hence, the following order :

ORDER

- (a) Application is allowed.
- (b) Applicant – Bilal Changesh Khan shall be released on bail in connection with C.R.No.180 of 2020 registered at Malwani Police Station on furnishing P.R. bond to the extent of Rs.25,000/- with one or two sureties of the like amount.
- (c) The applicant shall mark attendance in the concerned Police Station on first Monday of trimester between 10.00 a.m. to 12.00 noon.
- (d) Upon release, the Applicant shall furnish contact numbers and permanent residential addresses to the Investigating Officer and shall keep him updated in case of change in the same.
- (e) The Applicant shall regularly attend trial, on every date, unless exempted.

The observations made above are prima facie in nature and limited for the purpose of determination of the present Application and the learned Judge trying the Applicant for the offences, with which he is charged, shall not in any manner be influenced by the above order.

[BHARATI DANGRE, J]