

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.4004 OF 2023

Chukwuebuka Uwzo Egwo	...Applicant
vs.	
The State of Maharashtra	...Respondent

VISHAL
SUBHASH
PAREKAR

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**WITH
BAIL APPLICATION NO.204 OF 2024**

Izze Dickson Chidibere	...Applicant
vs.	
The State of Maharashtra	...Respondent

Mr. Gorakh Liman, for the Applicant in BA No. 4004 of 2023.
Mr. Dilip Mishra i/b. Mr. Ayaz Khan, for the Applicant in BA No. 204 of 2024
Ms. Supriya Kak, APP for the State.

CORAM :	N. J. JAMADAR, J.
RESERVED ON :	MARCH 19, 2024
PRONOUNCED ON :	APRIL 1 , 2024

ORDER

1. Heard the learned counsel for the applicants and the learned APP for the State.

2. The applicants who are arraigned in Special Case No. 512 of 2022 arising out of C.R. No. 33 of 2022 registered with Kasarwadavali police station for the offences punishable under section 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act, 1985) have preferred these applications to enlarge them on bail.

3. On 27th January, 2022 Vikas Ghodke, the then P.I., Crime Branch, Wagle Estae, Unit V, Thane received an information that on the very day between 6.30 to 7.00 pm a Nigerian national whose name and features were described was to arrive near the Bike Suraj Plaza Hotel, Anand Nagar, Thane to sell Mephedrone (MD) and Cocaine to his customers. Police conducted a surveillance. At about 7 pm Izze Dickson Chidibere (accused No. 1), the applicant in BA No. 204 of 2024, came at the said spot in a Hyundai i20 car. He was accosted. He was apprised of his right to be searched before the nearest Magistrate or gazetted officer under section 50 of the NDPS Act, 1985. The accused No. 1 declined to avail the said right.

4. In the personal search of accused No. 1 a small plastic pouch containing white colour powder was found in the right pocket and a big plastic pouch containing brown colour powder was found in the left pocket. The white colour powder was tested with the assistance of drug detection kit. The test turned out positive for cocaine. It weighed 4 gms. The brown substance found in the big plastic pouch turned out to be MD. It weighed 60 gms. The contraband articles were seized and samples of cocaine and MD were collected. Accused No. 1 came to be arrested. Initially, accused No. 1 made a disclosure statement on 28th January, 2022 voluntarily disclosing that he used

to buy cocaine from another Nigerian named Ameka and volunteered to point out the place where he had concealed the contraband article. Accused No. 1 led the police party to Room No. 203, Building No. 9/J-1, Om Sai Leela S.R.A Society Ltd., Sangharsh Nagar, Chandivali and took out a plastic bag which was concealed in the cupboard. The said bag contained cocaine and a small digital weighing scale. Cocaine weighed 270 gms. The contraband was seized and samples were collected.

5. Subsequently, accused No. 1 again made a disclosure statement on 1st February, 2022 to the effect that he had sometimes also purchased cocaine from another Nigerian named Chukwuebuka Uwzo Egwo (accused No. 2), the applicant in BA No. 4004 of 2023, and volunteered to point out his residence. Izze Chidibere (accused No. 1) led the police party to room No. 22, Besil CHS Ltd, Mohili village, Sakinaka. Accused No. 2 was found in the said room. A small handbag then being carried by accused No. 2 was searched. It contained 112 gms cocaine and other articles. The contraband article was seized and the samples were collected. Accused No. 2 came to be arrested. Post completion of investigation, charge sheet has been lodged.

6. I have heard Mr. Dilip Mishra, learned counsel for the applicant in Bail Application No. 204 of 2024 and Mr. Gorakh Liman, learned counsel for the applicant in Bail Application No. 4004 of 2023 and Ms. Supriya Kak, the learned APP for the State. With the assistance of the learned counsel for the parties, I have perused the material on record.

7. Mr. Mishra, the learned counsel for the applicant in BA No. 204 of 2024, submitted that there is a discrepancy in the timeline which vitiates the search. It was submitted that it is the case of the prosecution that pursuant to secret information a pre-trap panchanama was drawn between 4.30 pm to 5.15 pm. Trap panchanama was conducted between 5.15 to 8.50 pm. However, the requisition for the electronic weighing scale and articles required to conduct the trap was made at 9 pm. Thus, it becomes evident that the articles required for the search and seizure were obtained subsequent to the alleged search and seizure. This discrepancy vitiates the entire search. Secondly, there is breach of the mandate contained in section 52A of the NDPS Act, 1985. Evidently, the samples were drawn at the time of alleged search and seizure. Though inventory is shown to have been conducted after three months of the alleged seizure, yet the said inventory is of no

assistance. Fresh samples were not drawn before the Magistrate and the C.A report is based on the samples collected at the time of the alleged search and seizure. This being a fatal infirmity in the prosecution case, the interdict contained in section 37(1)(b)(ii) can be said to be overcome.

8. Mr. Gorakh Liman, the learned counsel for the applicant in BA No. 4004 of 2023 submitted that the applicant was not named in the FIR. Nor the name of the applicant was immediately disclosed by accused No. 1. In fact, one Ameka was stated to be the supplier of accused No. 1 in the first disclosure statement allegedly made by the applicant/accused No. 1 on 28th January, 2022. It was urged that to rope in the accused No. 2, another disclosure statement was obtained from accused No. 1 to the effect that sometimes, he had purchased the contraband from the applicant. Such disclosure is vague and cannot be termed a substantive piece of evidence. In any event, the result of analysis of the sample allegedly recovered from the possession of accused No. 2 was negative. Thus, the applicant deserves to be enlarged on bail.

9. In opposition to this, Ms. Supriya Kak, the learned APP strenuously submitted that the search and seizure has been carried

out in adherence to the provisions of NDPS Act, 1985. In the search of accused No. 1 contraband articles were found. Pursuant to discovery made by accused No. 1 a huge quantity of cocaine i.e. 270 gms, has been recovered. Inventory has also been conducted before the jurisdictional Magistrate. Therefore, it can not be said that there is a reasonable ground to believe that the accused are not guilty of the offence. Thus, the applicants do not deserve to be enlarged on bail.

10. To start with, the claim for bail of Chukwuebuka Uwzo Egwo (accused No. 2). As is evident, accused No. 2 came to be implicated on the basis of the disclosure statement made by the accused No. 1. In the second disclosure statement under section 27 of the Evidence Act, accused No. 1 stated that he had sometimes purchased cocaine from accused No. 2 and volunteered to point accused No. 2 and also his place of residence. Accused No. 1 led the police party to the house of accused No. 2. In the search, a small handbag was found in the possession of accused No. 2. It contained, inter alia, a plastic pouch containing 112 gm cocaine.

11. Panchanama records that two samples of 5 gms each were drawn and marked Exh-D1 and D2 and rest of the bulk i.e. 102 gm

was marked Exh-D. The forwarding letter dated 3rd February, 2022 indicates that the sample (Exh-D1) purportedly containing 5 gms cocaine was forwarded for analysis to C.A. The C.A report dated 20th October, 2023 reveals that the said sample (D1) was received on 3rd February, 2023. The analysis was started on 20th March, 2023 and completed on 31st May, 2023. The C.A. records results of analysis as under:-

“Results of the test for detection of Heroine, morphine, cocaine, mephedrone, methamphetamine, ketamine are negative in exhibit no (1), however sodium and chloride radicals are detected in it.”

12. Evidently, the sample tested negative for any narcotic substance. Sodium and chloride were detected. Thus, there is substance in the submission on behalf of the applicant Chukwuebuka Egwo (accused No. 2) that he was not found in possession of any narcotic substance. That would negate the charge for the offence punishable under section 22(c) qua the applicant.

13. As regards the charge under section 29 of the NDPS Act, 1985, the only material against the applicant appears to be the disclosure statement made by accused No. 1. It is trite a disclosure statement made by one accused is not legal evidence against non-maker co-accused. Since the substance allegedly recovered from the accused No. 2 was not found to a narcotic substance, the disclosure

statement made by accused No. 1 can not be said to be distinctly related to the fact thereby discovered. In the aforesaid view of the matter, it can be stated with a degree of assurance that the accused No. 2 has succeeded in making out a substantial probable cause which justifies an inference that accused No. 2 may not be guilty of the offences. The first of the twin tests thus stands satisfied. The Court is not informed that accused No. 2 has any antecedents. Therefore, a further inference that accused No. 2 may not indulge in identical offences if released on bail also becomes justifiable.

14. I am, therefore, impelled to exercise the discretion in favour of Chukwuebuka Egwo (accused No. 2).

15. As regards accused No.1 there is prima facie material to show that a commercial quantity of narcotic drug was found in possession of accused No. 1 in the personal search as well as pursuant to discovery made by accused No. 1. Prima facie there appears compliance of the provisions contained in section 42 as well as section 50 of the NDPS Act, 1985. The interdict contained in section 37(1)(b)(ii) of the NDPS Act, 1985 comes into play.

16. The endeavour of Mr. Mishra to call in question the sanctity of

search and seizure by pointing out the alleged discrepancy in the time line, does not merit countenance as the said discrepancy, even if it is assumed to exist, is not of such a nature as to throw the search and seizure overboard. There is ample contemporaneous record to show that accused No. 1 was accosted and in his search 4 gm cocaine and 60 gm MD was recovered.

17. This leads me to the ground of non-compliance of the mandate contained in section 52A of the Act, 1985. Mr. Mishra submitted that the entire prosecution case rests on the samples which were drawn at the time of alleged search and seizure. Though inventory was conducted before the jurisdictional Magistrate on 22nd April, 2022, after about three months of the search and seizure, yet, no fresh samples were drawn. Attention of the Court was invited to the certificate issued by learned Magistrate under section 52A (3) of the NDPS Act, 1985. Such inventory, according to Mr. Mishra, is of no evidentiary value. As samples were not drawn in the presence of the Magistrate, the prosecution case would fall, submitted Mr. Mishra.

18. On facts, the submissions of Mr. Mishra appear impeccable. The seizure panchanama indicates that after accused No. 1 was

allegedly found in possession of the cocaine and MD, two samples of cocaine, 1 gm each, were drawn and marked Exh. A1 and A2 and the rest 2 gm cocaine was kept in an envelope marked Exh. A. Likewise, two samples of MD; 5 gms each, were drawn and marked Exh. B1 and B2 and the bulk of MD i.e. 50 gm, was kept in an envelope marked B. Likewise, upon the recovery of 270 gms cocaine, pursuant to the discovery made by accused No. 1, two samples of cocaine, 5 gms each were collected and marked Exh.C1 and C2 and the balance bulk (260 gm) was marked Exh. C.

19. The forwarding letter dated 31st January, 2022 indicates that three samples namely Exh.A1 purportedly containing 1 gm cocaine, Exh. B1 purportedly containing 5 gms MD and Exh. C1 purportedly containing 5 gms cocaine (allegedly recovered from the accused No. 1) were forwarded to FSL. The C.A. report dated 20th October, 2023 reveals that the samples were received on 31st January, 2022 and the analysis of the samples (A1) and (C1) revealed cocaine and phenacetin and cocaine, respectively, and the analysis of samples (B1) revealed MD. Evidently, the CA report is based on the analysis of the samples which were drawn at the time of alleged seizure of contraband from the possession of the accused No. 1.

20. It would be contextually relevant to note that when the inventory was conducted before the learned Magistrate the bulk of cocaine (A) and (C) and the bulk of MD (B) and reserve samples of cocaine (A2) and (C2) and MD (B2) were produced before the learned Magistrate. In the certificate issued under section 52A(3), the learned Magistrate has in terms recorded that the first sample (A1), (B1) and (C1) have been sent for analysis to C.A. It does not appear that the samples were afresh drawn before the learned Magistrate. The learned Magistrate, simply records the weight of the bulk and reserve the samples which were produced before him. What consequences follow ?

21. In the case of **Alpeshkumar Sureshkumar Jain vs. State of Maharashtra**¹, I had an occasion to deal with the ground of non-compliance of the mandate contained in Section 52A of the Act, in a little detail. It was observed as under:

“14. Plain reading of the aforesaid provisions would indicate that when any contraband / narcotic substance is seized and forwarded to the Officer in-charge of the nearest police station or to the officer empowered under Section 53 of the Act, the Officer referred to in sub-section (1) of Section 52-A shall prepare the inventory of contraband / narcotic substance containing details and the description of the seized substance, like quality, quantity, mode of packaging, marks, number or such other identifying particulars of the contraband or packing in which they are packed, country of origin and other particulars, as may be found relevant and make the application to any Magistrate for the purpose of certifying the correctness of the

1 BA. No.1485 of 2023 Dt.31/01/24.

inventory so prepared and for taking photograph and certifying such photograph as true and for allowing to draw representative samples of such substance in the presence of such Magistrate and certifying the correctness of list of samples so drawn.

15. Sub-section (3) of Section 52-A enjoins the Magistrate to allow the application, as soon as may be. Sub-Section (4) of Section 52-A, which begins with non-obstante clause qua Indian Evidence Act and the Code of Criminal Procedure, 1973, provides that every Court trying an offence under the said Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

16. In the case of Union of India V/s. Mohanlal and Anr.² 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. The observations in paragraphs 15 to 17 read as under :

“15.It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. 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 of 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.

17. 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. That is perhaps why none of the States claim to be taking samples at the time of seizure.”

17. Following the aforesaid pronouncement, in the case of **Jabir Nader Ali (supra)**, the learned Single Judge of this Court (Bharati Dangre, J.) held that the non-compliance of Section 52-A, within a reasonable time, gives rise to an apprehension that the sample which is alleged to have been drawn and sent for analysis, could have been tampered with and in absence of certification from the Magistrate that the sample has been correctly drawn, the benefit of doubt must necessarily yield in favour of the applicant.

18. At this stage, it is necessary to make a reference to another decision of the learned Single Judge of this Court (M.S.Karnik, J.) in the case of **Mukesh Rajaram Chaudhari V/s. The State of Maharashtra**³ wherein after an elaborate analysis of the provisions contained in the Act, 1985 and the judgments of the Supreme Court in the cases of **Union of India V/s. Mohanlal (supra)** and **Simaranjit Singh V/s. State of Punjab**⁴ the learned Single Judge posed a question, whether those judgments completely take away the discretion of the Court while considering the grant or refusal of the bail to an accused under the NDPS Act and the rigours of Section 37 of the Act stand lifted ?

3 BA No.54 of 2023 dt. 27 Sept. 2023

4 2023 SCC Online SC 906

The learned Single Judge answered the question as under :

“37. It is undoubtedly true that when the investigating agency has not followed the procedure under Section 52A of the NDPS Act, the deeming fiction of photographs, samples etc., being treated as primary evidence as provided under Sub-section (4) of Section 52A would not be available. However, the question is, is this the only mode in which the prosecution can establish the charge against the accused? In this context, two scenarios are likely to arise. In both cases, let us assume that the prosecution has not followed the provisions of Section 52A and taken aid of the Magistrate in drawing the samples and sending for forensic analysis. In the first scenario, if the seized substance is still not destroyed and is available in the custody of the investigating agency, there is nothing to stop the said agency from following the full gamut of the procedure provided under Section 52A before destroying or disposing off the goods and then relying on the deeming fiction contained in Sub-section (4) of Section 52A of the NDPS Act. The only question in such a scenario would be why were such steps taken at a belated stage. Second scenario would be that the samples have been drawn, not in the presence of Magistrate and the goods have been destroyed with the permission of the Magistrate. In such a situation also, all that can happen is with the prosecution cannot avail of the deeming fiction provided in Sub-section (4) of Section 52A of the NDPS Act. This, however, does not mean that the prosecution cannot establish the charges against the accused through the means of other evidence available with it. For example, if the process of taking samples may not be in the presence of the Magistrate, but is shown to be properly followed with the aid of the support of the panch witnesses which the court finds believable and reliable, I do not see how the prosecution case would be destroyed totally. In either of the scenarios noted above, it would be eventually a question of what evidence is brought on record and how such evidence is to be evaluated. Both the aspects are in relation to conduct of trial. At the stage when the court is concerned with the question of granting or refusing bail, this cannot be the sole consideration. It may be one of the relevant considerations but cannot be the sole consideration on the basis of which the moment it is shown that the procedure under Section 52A of the NDPS Act is not followed, the accused automatically becomes entitled to bail as a matter of right. The rigors of Section 37 of the NDPS Act would continue to apply. Only when the bail court is satisfied

that reasonable grounds of believing that the accused is not guilty of the offence and that he is not likely to commit any offence while on bail, the bail would be granted. I, therefore, do not find any merit in the submission of learned counsel for the applicant that in the present case non-compliance of Section 52A would entitle the applicant to bail.”

19. It must also be noted that in the case of **Jabir Nader Ali (Supra)**, this Court noted the decision in the case of **Mukesh Rajaram Chaudhari (Supra)**, and yet, in the facts of the said case, found that an endeavour was made to comply with the mandate of Section 52-A in a perfunctory manner, and, thus, exercised the discretion to release the accused therein on bail.

20. The approach adopted by this Court in the case of **Mukesh Rajaram Chaudhari (supra)**, cannot be said to be unsustainable. The endeavour of the Court was to balance the object with which the interdict contained in Section 37 of the Act, 1985 has been enacted with the imperativeness of following the mandatory provisions of the Act, 1985 which provide in built safeguard against the possibility of planting or false implication. The insistence on scrupulous compliance of the provisions which incorporate the safeguards, is premised on the stringent punishment which the offences entail and also a statutory bar in the matter of releasing the accused on bail.

21. A case of complete non-compliance of Section 52-A and the one with material to indicate that there was a substantial compliance or there was still possibility of compliance of Section 52-A of the Act, in my view, stand on different footings. It is in the aforesaid context, reference to the decisions of the Supreme Court in the case of **Yusuf @ Asif V/s. State (supra)**, and **Simaranjit Singh V/s. State of Punjab (supra)**, would be advantageous.

22. In the case of **Yusuf @ Asif V/s. State (supra)**, 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.”

23. In the case of Simaranjit Singh V/s. State of Punjab (supra), 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 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.”

22. The recent decision of the Supreme Court in the case of **Mohammed Khalid and another vs. The State of Telangana**⁵ firmly settles the issue. 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)

23. In the case at hand, though inventory has been conducted yet the prosecution case rests on the samples drawn at the time of

5 Cri. Appeal No(s).1610/2023, Dt.1/3/2024.

seizure itself, as is evident from the CA report adverted to above. In the case of **Mohd. Khalid** (supra), the Supreme Court has ruled that such CA report based on the samples not drawn in the presence of the Magistrate is bereft of any evidentiary value.

24. Thus I find substance in the submission of Mr. Mishra that the prosecution will have to surmount the challenge of non-compliance of section 52-A of the Act, 1985, in the matter of not drawing the sample in the presence of Magistrate and placing reliance on the CA report based on the samples drawn at the time of seizure, which the Supreme Court has in a line of decisions, held to be not in conformity with the provisions of the NDPS Act, 1985. Resultantly, the Court may be justified in drawing an inference that the accused No.1 may not be guilty of the offences under the NDPS Act, 1985.

25. The Court is not informed that the accused No. 1 has antecedents. Thus, the Court may draw an inference that the accused No. 2 may not commit an identical offence, if released on bail. Consequently, the interdict contained in section 37(1)(b)(ii) may not operate.

26. I am, therefore, inclined to release accused No. 1 also, on bail.

Hence, the following order.

ORDER

- 1] The applications stand allowed.
- 2] The applicants Chukwuebuka Uwzo Egwo and Izze Dickson Chidibere be released on bail in C.R. No. 33 of 2022 registered with Kasarwadavali police station on furnishing a P.R. Bond of Rs. 1,00,000/- each with one or more sureties in the like amount, each.
- 3] The applicants shall mark their presence at Kasarwadavali 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] Subject to the deportation proceedings which may be initiated against the applicants for the overstay in India, if any, the applicants shall not leave India without prior permission of the Special Court.
- 5] The applicants 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.
- 6] The applicants shall furnish their contact numbers and residential addresses to the investigating officer and shall keep him updated, in case there is any change.
- 7] The applicants shall regularly attend the proceedings before the jurisdictional Court.

8] 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.

Applications disposed.

(N. J. JAMADAR, J.)