

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 260 OF 2024

Zalwango Moureen @ Anita

...Applicant

vs.

The State of Maharashtra

...Respondent

Ms. Aswhini Achari, a/w, Ms. Alisha Parekh i/b, Taraq Sayed, for the Applicant.

Ms. Ranjana D Humane, APP, for the Respondent-State.

CORAM : N. J. JAMADAR, J.

RESERVED ON : 23rd April, 2024

PRONOUNCED ON: 9th May, 2024.

P.C.:

1. The applicant who is arraigned in C. R. No. 14 of 2022, registered with DBC CID UNIT 5, Mumbai, for the offence punishable under Section 22 (c) of the Narcotics Drugs and Psychotropic Substances Act, 1985 and Section 14 of the Foreigners Act, 1946, has preferred this application to enlarge her on bail.

2. On 27th April, 2022, specific information was received that the applicant was to come near Shivnagar, Kalina Santacruz (east), Mumbai, wearing Burqa to sell Mephedrone (MD) to her customers between 16:00 hours to 17:00 hours. A surveillance was mounted. At about 4:25 pm., the applicant whose features matched the description furnished by the informant, came in front of hotel Malvan Kinara, Shivnagar, Kalinga, Santacruze (east). Her movements appeared suspicious. She was accosted. She was

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apprised of her right to be searched in the presence of nearest Magistrate or Gazetted Officer. However, she gave consent to be searched by the police

3. In the search of the purse which the applicant was carrying, a white substance was found kept in a transparent pouch. It appeared to be Mephedrone (MD), It weighed 230 gram. The contraband article was seized. The applicant came to be arrested.

4. Ms. Ashwini Achari, the learned Counsel for the applicant, submitted that the search and seizure was thoroughly vitiated. There was a complete violation of the provisions contained in Section 50(4) of the NDPS Act, 1985. In breach of the statutory mandate, the applicant was searched by males. Secondly, the applicant came to be arrested on 28th April, 2022 at about 00.10 am., after sunset and before sunrise, without obtaining the prior permission of the judicial magistrate. It was also submitted that the search was carried out by unauthorised persons and therefore on that count also the search stood vitiated. Lastly, there was discrepancy in the place at which the applicant was to come, as per the specific informant, and the place where the seizure was allegedly effected. Therefore the applicant deserves to be enlarged on bail.

5. Ms. Humane, the learned APP countered the submissions on

behalf of the applicant. It was urged that the applicant, a foreign national, had overstayed in India and indulged in drug trafficking. Therefore, she does not deserve the exercise of discretion. Ms Humane further submitted that there is scrupulous compliance of the provisions contained in Section 50 of the NDPS Act, 1985 and the rest of the grounds sought to be urged on behalf of the applicant are of a technical nature and can only be considered at the stage of trial. As the interdict 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 and the documents annexed with it. The applicant was allegedly found in possession of 230 gram Mephedrone (MD), a commercial quantity. Thus, the interdict contained in Section 37(1)(b)(ii) comes into play. Is there a substantial probable cause to believe that the applicant may not be guilty of the offences for which she has been arraigned?

7. From the perusal of the seizure memo it becomes prima facie evident that after the applicant gave her consent for being searched by the PI Yerekar, the authorised officer checked the purse which the applicant was carrying with the assistance of the women police constable and in the presence of the panch witnesses namely, Sabha

Shaikh and Avesh Khan. One of the panchas appeared to be a female. The pre-trap panchanama indicates that the police party consisted of lady police naik Kakirde, lady police constable Deshmukh and lady police constable Patil. As noted above, the seizure panchanama records that the authorised officer searched the purse of the applicant with the assistance of the women police constable/naik.

8. Section 50(4) of the NDPS Act, 1985 mandates that no female shall be searched by anyone except a female. In the case at hand, it prima facie appears that the search of the applicant was conducted in the presence and gaze of male officer, male members of the raiding party and a male panch witness.

9. A useful reference, in this context, can be made to a Division Bench judgment of this Court in case of ***Veneela Tilak Vs. Shahasane, Assistant Collector of Customs***¹. In the said case, after advertng to the provisions contained in Section 50 of the NDPS Act, 1985 and identical provisions in the Customs Act 1962, Foreign Exchange Regulations Act, 1973 and Section 100 of the Code of Criminal Procedure, 1973, it was enunciated that if the investigating agency carries out the search of a female in the presence of male panchas, the very purpose sought to be achieved by Section 50(4) of the NDPS Act, 1985, the provisions contained in

¹ 1992(2)Mh.L.J. 337

the Code and other like enactments, enacted to protect the modesty and dignity of a lady, would be lost. The observations in paragraph nos. 15 and 18 read as under:

“15. Now if a woman accused has to be searched, merely calling a female officer to search her will not fulfil the legislative intent. The legislative intent appears to be to protect the lady accused’s modesty while conducting her search. The search has to be conducted by having strict regard for decency. Therefore, the officers will necessarily have to secure the presence of lady panchas. If the search is carried out in the presence of male panchas, the very purpose of sub-section (4) of section 50 of the N.D.P.S. Act and such similar provisions contained in other statutes would be frustrated. What is sought to be achieved by sub-section (4) of Section 50 of the N.D.P.S. Act, the relevant provisions of the Customs Act and the F.E.R.A. would be lost if the investigating agency does not carry out the search by a female in the presence of female panchas.

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18 In spite of the observations made by the Supreme Court in the judgment reported in *AIR 1962 (sc) 1189*, that the search of a lady accused conducted in the presence of a male panch is contrary to the spirit or even the letter of the Criminal Procedure Code, and the observations of this Court in case reported in *1994-I-FAC 285 (Bombay)* that ladies should be searched in secluded places, we are distressed to find that the correct procedure is till not being followed by the investigating agencies. In some cases with which we had an occasion to deal, we have noticed that the necessary care is not taken by the investigating officers while conducting search of the female accused. We find that though in some cases the investigating agencies adhere to sub-section (5) of section 5 of the N.D.P.S. Act, they do not follow it up by bringing in lady panchas and by taking the lady accused to a secluded place.”

10. The aforesaid Division Bench judgment was followed by a

learned Single Judge in the case of *Heena Bharat Shah Vs. State of Maharashtra*², wherein the Court observed as follows:

“4. In the present case the applicant Heena Shah, a female was searched, that is her person was searched within the gaze of males. Prima-facie, it appears that the applicant Heena Shah was not searched in seclusion and in the absence of any male person. That there is a contravention of section 50(4) of NDPS Act, 1985 and the provisions in it spirit have been violated as has been laid down by the Division Bench of this Court in the case of *Mrs. Veenela Tilak* (supra). The provision envisages regard for the person and privacy of a female and the same is not honoured by the mere fact of the search being carried out by a female constable. Section 50(4) of NDPS Act. Additionally requires that the female accused be searched in seclusion and to the exclusion of males. It is, therefore, reasonable to believe that the applicant has not committed an offence punishable with imprisonment for more than five years as contemplated under the provisions of NDPS Act, 1985. It further prima-facie appears that there is no reasonable belief that she is likely to commit an offence punishable under the NDPS Act if released on bail.”

11. A profitable reference can also be made to a judgment of the Supreme Court in a case of *State of Punjab Vs. Surinder Rani Alias Chhindi*³, wherein it was enunciated that the requirement of Section 50(4) is mandatory and cannot be diluted even on the ground that

² 2017 SCC OnLine Bom 1396

³ (2000) 10 SCC 426

a female was not available at the time of search

12. In the case at hand, the applicant was searched not only in the gaze of male officers/officials and panch witnesses, but the search was purportedly effected by a male police officer and, therefore, prima facie the search appeared to be in contravention of Section 50(4) of the NDPS Act 1985.

13. The non-compliance of the mandate contained in Section 42 of the NDPS Act 1985 also stems from the search having been effected by the women police constables/naik and panch witnesses. It was urged that neither the women police constables/naik, nor the panch witness were authorised to effect the search. Reliance was placed on the decisions of this Court in the case of *Aarif Akram Shaikh Vs. The State of Maharashtra*⁴ and *Mohd. Jaffar Mohd. Babar Shaikh Vs. State of Maharashtra*⁵ wherein this Court granted bail as the person who accompanied the authorised officer and conducted the search was not authorised to effect the search. Reliance on these cases appears well founded.

14. Thirdly, the ground of the arrest of the applicant in breach of the provisions contained in Section 46 of the Code also appears to carry substance. In the case of *Aleksander Kurganov Vs. State and Another*⁶, a learned Single Judge of this Court after referring to the

4 Bail Application no. 3158 of 2021 dated 7th February 2023

5 Bail Application no. 3122 of 2022

6 2021 SCC OnLine Bom 150

decisions in the cases of *Kavita Manikikar Vs. Central Bureau of Investigation & Anr. Bharti S Khanda and Veneela Tilak* (supra) ruled that since the arrest of the applicant was effected after sunset and before sunrise, without the prior permission of judicial magistrate, the arrest stood vitiated and therefore the accused was to entitled to bail.

15. The conspectus of aforesaid consideration is that the search and seizure stood vitiated on multiple counts. Thus, the Court may draw an inference that there is a substantial probable cause to believe that the applicant may not be guiltily of the offences for which she has been arraigned. The Court is not informed that the applicant has antecedents.

16. So far as the submission on behalf of the prosecution that the applicant had overstayed and allegedly committed the offence punishable under Section 14 of the Foreigners Act, it would be suffice to note that the authorities may resort to appropriate proceedings. Therefore, I am inclined to allow the application. Hence, the following order:

Order

- 1] The application stands allowed.
- 2] The applicant Zalwango Moureen @ Anita be released on bail in C. R. No. 14 of 2022 registered with

DBC CID UNIT 5, Mumbai, for the offence punishable under Section 22 (c) of the Narcotics Drugs and Psychotropic Substances Act, 1985 and Section 14 of the Foreigners Act, 1946, on furnishing a P.R. Bond of Rs.1,00,000/- with one or more sureties in the like amount to the satisfaction of the learned trial Court.

3] The applicant shall mark her presence at office of DBC CID UNIT 5 on the first Monday of every month between 11.00 am to 1.00 pm for a period of three years or till conclusion of the trial, whichever is earlier.

5] 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.

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

7] Subject to the deportation proceedings that may be initiated against the applicant, the applicant shall not be leave India without the prior permission of learned Special Judge.

8] The applicant shall regularly attend the

proceedings before the jurisdictional Court.

9] The applicant shall not indulge in the identical activity for which she has been arraigned in this case.

10] 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.

11] Application stands disposed of.

(N. J. JAMADAR, J.)