

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION

**BAIL APPLICATION NO.236 OF 2023**

Sohail Shaikh s/o. Chottan Shaikh ...Applicant

vs.

Union of India and Another ...Respondents

Mr. Dilip Mishra i/b. Mr. Ayaz Khan, for the Applicant.

Ms. Manisha Jagtap i/b. Mr. Hiten Venegaonkar, for UOI.

Ms. Ranjana Humane, APP, for the Respondent/State.

**CORAM : N. J. JAMADAR, J.**

**DATE : APRIL 22, 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 NDPS Special Case No. 1580 of 2021 arising out of C.R. No. 51 of 2021 registered with NCB, Mumbai for the offences punishable under sections 22(c), 27, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act, 1985) seeks to be enlarged on bail.

3. On 1<sup>st</sup> June, 2021, an intimation was received that a named carrier, was to arrive near Crescent Royale, Andheri (w) along with narcotic drugs. The intelligence officer took down the information into writing and apprised his immediate official superior. A surveillance was mounted. At about 8.40 pm the applicant, whose features matched the description furnished by the informant, came

near Crescent Royale. He was accosted. The investigating officer apprised the applicant of his right to be searched in the presence of the nearest Magistrate or Gazetted officer. As the applicant declined to avail the said right and stated that he be searched in presence of a Gazetted officer of NCB, personal search of the applicant in the presence of Mr. V.V. Singh, Superintendent, who was a member of the raiding party, was conducted.

4. During the course of search, the applicant voluntarily handed over a transparent polythene packet containing white powder. The said substance appeared to be Mephedrone (MD). It weighed 55 gms. The contraband article was seized and put inside the green envelope marked 'M'. The applicant disclosed that he had procured the contraband substance from Mohd. Firoz (accused No. 2).

5. In the search of the room in which the accused No. 2 was residing, a white plastic gunny bag was found kept below the bed. A polythene pouch containing white powder was found in the said gunny bag. The said substance appeared to be MD. It weighed 102 gm. The said substance was also seized and put inside the green envelope (M1). The applicant and the co-accused were arrested.

6. Mr. Mishra, the learned counsel for the applicant, submitted that there is non-compliance of the mandate contained in section 50 of the NDPS Act, 1985. Secondly, the material on record indicates

that the alleged search and seizure is unworthy of credence.

7. Inviting the attention of the Court to the notice under section 67 of the NDPS Act, 1985 given to the applicant (page 42) whereby the applicant was called upon to appear before the investigating officer at 11.00 am on 1<sup>st</sup> June, 2021 though the the seizure panchanama would indicate that the search and seizure was effected between 8.30 pm to 11.15 pm on 1<sup>st</sup> June, 2021, Mr. Mishra submitted that the said notice falsifies the search and seizure. Secondly, there is discrepancy in the substance which was allegedly recovered from the applicant and the sample which was forwarded to the CFSL. The examination report (B) (Page 114) indicates that the CFSL had received a transparent heat sealed zip lock polythene packet containing light brown coloured crystalline substance in lumps and powder. Whereas what was seized was white powder. Thirdly, the CA report indicates that that result was positive for Methamphetamine and MD. No bifurcation has been furnished by the investigating agency. Therefore, it cannot be said that the applicant has been found in possession of commercial quantity. Lastly, Mr. Mishra submitted that Mr. Arbaz Ukane, the panch witness, is not only a habitual panch but has himself been allegedly involved in illicit drug trade. Attention of the Court was invited to the observations of this Court in the case of **Zaid Javed Petiwala vs.**

**Narcotics Control Bureau and Anr.<sup>1</sup>**

8. In opposition, Ms. Jagtap, the learned Special Public Prosecutor for respondent No. 1, submitted that the applicant was, in fact, apprised of his right to be searched before the nearest Magistrate or gazetted officer. Therefore, it cannot be said that there was non-compliance of the mandate contained in section 50 of the Act. The rest of the grounds urged on behalf of the applicant, according to Ms. Jagtap, revolve around factual aspects which can only be adjudicated at the stage of trial. In the circumstances, as commercial quantity has been found in possession of the applicant, the interdict contained in section 37 of the NDPS Act, 1985 comes into play and, therefore, the applicant cannot be released on bail as the twin conditions can not be said to have been satisfied.

9. It is trite the provisions contained in section 50 of the NDPS Act warrant scrupulous compliance. In the case of **State of Punjab vs. Baldev Singh<sup>2</sup>**, a constitution Bench of the Supreme Court enunciated that “when an officer, duly authorised under Section 42 of the Act, is about to search a person he must inform him of his right under sub- section (1) thereof of being taken to the nearest Gazetted Officer or nearest Magistrate for making the search. However, such information must necessarily be in writing. Failure

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1 BA No. 2309 of 2022 Dt.10/11/2022.

2 (1999) 6 Supreme Court Cases 172.

to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused. A search in breach of the said mandate may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.”

10. In the case of **Vijaysinh Chandubha Jadeja vs. State of Gujrat**<sup>3</sup> another Constitution Bench further enunciated that,

31] We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in **Joseph Fernandez vs. State of Goa**<sup>4</sup> and **Prabha Shankar Dubey vs. State of M.P.**<sup>5</sup> is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in **Baldev Singh's case** (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.

32] We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest

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3 (2011) 1 SCC 609.

4 (2000) 1 SCC 707.

5 (2004) 2 SCC 56.

Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.

11. Reverting to the facts of the case, the prosecution proposes to substantiate compliance of the mandate contained in the NDPS Act, 1985 by referring to the seizure panchanama and the notice (page 28) purportedly given under section 50 of the NDPS Act, 1985. Attention of the Court was invited to the endorsement made by the applicant that he be searched by any Gazetted officer of NCB.

12. Whether the aforesaid appraisal is in conformity with the provisions of section 50 of the NDPS Act, 1985 ? It is the prosecution case that on the basis of the aforesaid option exercised by the applicant, he was searched in the presence of Mr. V.V. Singh, the Superintendent, who was a member of the raiding party. If considered in the light of the object of providing the safeguard under section 50 of the NDPS Act, 1985, can such a search before a gazetted officer, who happens to be a member of the raiding party lend the element of authenticity, transparency and credit-worthiness to the search and seizure, is the question.

13. A useful reference in this context can be made to the decision of the Supreme Court in the case of **State of Rajasthan vs. Parmanand and Another**<sup>6</sup>. In the said case, the investigating officer

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6 (2014) 5 Supreme Court Cases 345.

had given the third option to the suspect/ respondents therein that they could be searched before the nearest Magistrate or before a nearest Gazetted officer or before PW-5, the Superintendent, who was a part of the raiding party. The Supreme Court held that the offer of third option was in breach of section 50(1) of the NDPS Act, 1985. The idea behind apprising of the right was to give a chance of being searched in the presence of an independent officer. The Superintendent who was part of the raiding party cannot be called an independent officer. The observations in paragraph 19 read as under:-

19] We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of [Section 50\(1\)](#) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.

14. Reverting to the facts of the case, evidently without the applicant being specifically apprised that a Gazetted officer namely V.V. Singh, the Superintendent, was a member of the raiding party, he would not have known that he could exercise the option to be searched in the presence of a Gazetted officer of NCB. In any event, a member of the raiding party who happens to be a Gazetted officer cannot be considered such an independent officer as to afford transparency and credit-worthiness to the search and seizure which such search before the nearest Magistrate or other Gazetted officer may lend to.

15. I, therefore, find substance in the submission on behalf of the applicant that the search before the Superintendent who happened to be a Gazetted officer and yet a member of the very raiding party cannot be said to be in scrupulous compliance of the mandate contained in section 50 of the Act, 1985.

16. The rest of the grounds urged on behalf of the applicant are indeed rooted in facts. The aspect of the discrepancy in the time of the search and seizure operation and the notice given to the applicant under section 67 of the Act, however, appears to be starkly evident. The search and seizure continued from 20.30 hours to 23.15 hours. In that view of the matter, the applicant could not have been called upon by the investigating officer on 1<sup>st</sup> of June,

2021 at 11 am as the search and seizure took place hours later.

17. In any event, the applicant has been in custody since 1<sup>st</sup> June, 2021. In the light of the apparent infirmity in the compliance of the mandate contained section 50 of the Act, 1985, and a bleak prospect of the conclusion of the trial in near future, in my view, the interdict contained in section 37 of the Act may not operate. The Court is not informed that the applicant has antecedents.

18. I am, therefore, inclined to hold that the twin test stands satisfied. Thus, the applicant deserves to be enlarged on bail.

Hence, the following order.

### **ORDER**

1] The application stands allowed.

2] The applicant be released on bail in C.R. No. 51 of 2021 registered with NCB, Mumbai, 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 his presence at NCB, Mumbai 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 his 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.)**