

Sayali Upasani

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

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BAIL APPLICATION NO. 487 OF 2024

Naziya Rabiul Islam @ Shobha Devdas Mondol ...Applicant
Versus
The State of Maharashtra ...Respondent

Mr. S. S. Sawalkar, for Applicant.

Mrs. G. P. Mulekar, APP for State/Respondent.

Mr. Nitin Zade, PSI and Mr. Sutar, PSI, D.B. Marg Police
Station, Present.

CORAM:- N. J. JAMADAR, J.

DATED:- 8th FEBRUARY, 2024.

ORDER:-

- 1) Heard the learned Counsel for the applicant and the learned APP for the State.
- 2) The applicant, who is arraigned in connection with CR No. 28 of 2023, registered with DB Marg police station, Mumbai, for the offences punishable under Section 22 (c), read with Sections 8 (c), and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ("the Act, 1985") has preferred this application to enlarge her on bail.

3) On 3rd May, 2023, pursuant to a secret information, DB Marg police conducted surveillance in front of Grant Road Branch of Axis Bank, Lamington Road, Mumbai. As informed, a male with a matching description and a female wearing veil (Burkha) arrived thereat. Their movements appeared suspicious. They were accosted. They were apprised of their right under Section 50 of the NDPS Act, 1985.

4) In the search of co-accused Mohammad Shafiq Mohammad Ali Shah, a white substance, which appeared to be Mephedrone (MD) was found. The contraband article weighed 380 grams. In the search of the applicant by a lady Police Constable, a purse was found. It had a pouch containing a white substance. The said substance appeared to be Mephedrone (MD). It weighed 200 grams. The contraband articles were seized and samples were collected. The co-accused and the applicant came to be arrested.

5) Mr. Sawalkar, the learned Counsel for the applicant, submitted that the search and seizure stand vitiated for non-compliance of the mandatory provisions contained in Sections 42 and 50 of the NDPS Act, 1985. Elaborating the submissions, Mr. Sawalkar would urge that the raid was allegedly conducted pursuant to a secret information received by Assistant Police Inspector Rajaram Pol. However, Rajaram Pol did not reduce the

said information into writing and forward its copy to his immediate superior in compliance with the mandate contained in Section 42 of the NDPS Act, 1985.

6) Secondly, Mr. Sawalkar would urge, qua the applicant the search stood completely vitiated as it was conducted in the presence of male Pancha witnesses. Since the applicant was not searched in seclusion in the presence of female pancha witness so as to ensure that her dignity and modesty were not offended, there is a flagrant violation of the provisions contained in sub-section (4) of Section 50 of the NDPS Act, 1985, which mandates that a female shall be searched in the presence of a female only.

7) Mrs. Mulekar, the learned App, joined the issue. It was submitted that the ground of non-compliance with the provisions containing Section 42 of the NDPS Act, 1985, does not merit countenance as an entry about the information having been received was made by Mr. Rajaram Pol in the station diary. That constitutes a sufficient compliance of the mandate contained in Section 42 of the NDPS Act, 1985. In any event, according to Mrs. Mulekar, that is a matter for trial. Even the contention on behalf of the applicant that the applicant was not searched by a female is against the weight of the material on record, submitted Mrs. Mulekar. Inviting attention of the Court to the seizure

panchanama and the FIR, wherein it has been recorded that the applicant was searched by lady Police Constable Jadhav, it was submitted that the said ground is unworthy of acceptance.

8) To begin with, the alleged non-compliance of the statutory mandate contained in Section 50 of the NDPS Act, 1985. One of the conditions under which the search of a person shall be conducted incorporated in sub-section (4) of Section 50 of the NDPS Act, 1985 is :

“No female shall be searched by anyone excepting a female.”

9) Mrs. Mulekar made an endeavour to draw home the point that since the search was conducted by a lady Police Constable, the requirement of aforesaid statutory prescription stood satisfied. I am afraid to accede to the aforesaid submission unreservedly. If the mandate of sub-Section (4) of Section 50 of NDPS Act, 1985, is considered to have been complied with the moment a female is searched by a female Officer/Official, then the spirit of the said provision would be lost. Two considerations deserve to be noted. One, it would then imply that the search by a female Officer/Official in the presence and under the gaze of a male would be in order. Two, the necessity of public witnesses to

evidence the search is a surplusage. Both implications cannot be countenanced.

10) The judgment of a Division Bench of this Court in the case of **Veneela Tilak Vs. Shahasane, Assistant Collector of Customs and Others**¹, has considered the import of sub-Section (4) of Section 50 of the NDPS Act, 1985. After analysing the provisions of Section 50 of the NDPS Act, 1985 and the enactments which incorporate such condition in the matter of the search of females, the Division Bench, in terms, observed that merely calling a female Officer to search a female will not fulfil the legislative intent. The observations in paragraph Nos. 15. 16, 18 and 19 are instructive and, hence, extracted bellow.

“...15. Now if a woman accused has to be searched, merely calling a female officer to search her will not fulfill 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 Criminal Procedure Code quoted herein above and similar provisions of the Customs Act and the F.E.R.A. would be lost if the

1 1997 (2) MhLJ 337

investigating agency does not carry out the search by a female in the presence of female panchas.

16. In this regard reference may be made to the decision of the Supreme Court in MANU/SC/0106/ 962: AIR 1962 SC 1189 where the Supreme Court had an occasion to comment on a search of a woman carried out in the presence of men. The Appellant in that case was tried for an offence under the Suppression of Immoral Traffic in Women and Girls Act. The charge against the Appellant was that she supplied a girl to one Manmohan Mehta, who is a witness and she kept or managed a brothel. The prosecution story was that after the information was received, a trap was laid and two persons were sent to the Appellant to ask for a girl for the purpose of prostitution. One of them was to be a panch, a witness to the fact that the appellant supplied females for prostitution. Two one-hundred rupees marked currency notes were given to Mehta with instruction that he was to pay out of that to the appellant. He accordingly paid the amount quoted by the appellant. It is not necessary to make reference to the other facts of the case except that, during the course of investigation the women panchas accompanied the police party and searched the appellant and one hundred rupees currency note was found from her person under her blouse. It was argued that the said evidence should not be accepted, as according to law no woman can be searched except by another woman and having regard to the provisions of Sections 152 and 103 of the Criminal Procedure Code that cannot be done in the presence of men. The Supreme Court held that such a search though an irregularity was contrary to the spirit or even the letter of the Criminal Procedure Code.

.....

18. In spite of the observations made by the Supreme Court in the judgment reported in MANU/SC/0106/1962 : 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 1994-1-FAC 285 (Bombay) that ladies should be searched in secluded places, we are distressed to find that the correct procedure is still 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.

19. It is implicit in the above quoted provisions of Criminal Procedure code and the relevant Acts that while conducting a search of a woman, female panchas must be called and the woman accused must be taken to a secluded place. Any deviation or lapse on the part of the investigating officer in this connection would defeat the above provisions and may followed and the investigating Agency should refrain from diluting it or giving a go by to it."

(emphasis supplied)

11) The aforesaid pronouncement was followed by a learned Single Judge of this Court in the case of **Miss. Henna Bharat Shah Vs. State of Maharashtra, Bail Application No. 1051 of 2016, dated 24th April, 2017.** In the said case where the female accused was not searched in seclusion and away from the gaze of the males, it was held that there was a contravention of the provisions contained in sub-Section (4) of Section 50 of the NDPS Act, 1985 and the spirit of the said prescription stood violated.

12) In the case at hand, the search and seizure were admittedly conducted in the presence of male Pancha witnesses. It is the stand of the prosecution that the person of the applicant was searched by a lady police as per the directions of Mr. Pol, A.P.I. and in the presence of the male Pancha witnesses. Evidently, the provisions contained in sub-section (4) of Section 50 of the NDPS Act, 1985 were observed in breach.

13) The submission of non-compliance with the provisions contained in Section 42 (2) was premised on the alleged failure on the part of Mr. Pol, who had received the information, to record the same into writing and forward a copy thereof to his superior. Ms. Sawalkar would urge that the FIR indicates that the information was received by Mr. Pol. However, there is no material to indicate that he had reduced the same information into writing. The fact that the information was forwarded by the Senior Police Inspector to the Assistant Police Constable, according to Ms. Sawalkar, is not an adequate compliance of the provisions contained in Section 42 (2) of the NDPS Act, 1985.

14) To lend support to this submission, Ms. Savalkar placed reliance on orders passed by this Court in the cases of **Sanobar Shafiq Khotal Vs. State of Maharashtra in Bail Application No. 3337 of 2021**, dated 14th October, 2022, **Umer Usman Khan Vs.**

State of Maharashtra in Bail Application No. 3521 of 2019, dated 21st February, 2023, and Rajaram Kadu Vs. State of Maharashtra in Bail Application No. 2108 of 2016, dated 13th June, 2017.

15) In the aforesaid cases, this Court after noting the non-compliance of the provisions containing Section 42 (2) of the NDPS Act, 1985, had exercised the discretion to grant bail when the information was not recorded by the Officer who had received the same.

16) Mrs. Mulekar would urge that the information was indeed forwarded by the Senior Police Inspector to the Assistant Police Commissioner, after an entry was made in the station diary by Mr. Pol. It was thus submitted that the question as to whether there was scrupulous compliance with the mandate contained in Section 42 (2) of the NDPS Act, 1985, can be legitimately decided at the stage of trial and the applicant cannot claim bail on the said ground.

17) In the case of **Sarija Banu Alias Janarthani Alias Janani and Others Vs. State Through Inspector Of Police (2004) 12 SCC 266**, the Supreme Court has held that compliance of Section 42 of the NDPS Act, 1985 should engage the attention of the Court, while considering Bail Application.

18) In the facts of the case, in my view, the aspect of non-compliance of Section 42 (2) need not be delved into in detail, at this stage. *Prima facie*, it appears that apart from an entry in the station diary, there is no material to indicate that Mr. Pol had communicated a copy of the information reduced by him into writing to the superior officer. Such communication it appears was made by Mr. Pradeep Ramchandra, the Senior Police Inspector, DB Marg Police Station. Whether that constitutes scrupulous compliance of Section 42 (2) of the NDPS Act, 1985 may be a matter for trial. But that does not seem to be the position as regards non-compliance of Section 50 (4) of the NDPS Act, 1985.

19) As noted above there is a clear non-compliance of the mandate contained in Section 50 (4) of the NDPS Act, 1985. Resultantly, the search and seizure qua the applicant *prima facie* becomes unsustainable.

20) In the circumstances, it can be said that there are reasonable grounds to believe that the applicant may not have committed the offences for which she has been arraigned. The Court is not informed that there is any antecedent of the applicant. Thus, it may be justifiable to draw an inference that

the applicant will not indulge in an identical activity, if she is released on bail.

21) I am, therefore, impelled to exercise the discretion in favour of the applicant.

22) Hence, the following order:

: O R D E R :

(i) The application stands allowed.

(ii) The applicant Naziya Rabiul Islam @ Shobha Devdas Mondol be released on bail in CR No. 28 of 2023, registered with DB Marg police station, Mumbai, for the offences punishable under Section 22 (c), read with Sections 8 (c), and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985, on furnishing a P.R. Bond in the sum of Rs.1,00,000/- with one or two sureties in the like amount, to the satisfaction of the trial Court.

(iii) The applicant shall mark her presence at the concerned Police Station on the first Monday of every month between 10.00 am to 12.00 noon for a period of two years or till conclusion of trial, whichever is earlier.

(iv) The applicant shall not tamper with the prosecution evidence and/or give threat or inducement

to the first informant and any of the persons acquainted with the facts of the case.

(v) The applicant shall not indulge in the identical activity for which she has been arraigned in this case.

(vi) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of 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.

[N. J. JAMADAR, J.]