

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.529 OF 2024

Shivarth Raaj Dutt ...Applicant
vs.
The State of Maharashtra ...Respondent

Mr. Dilip Mishra i/b. Mr. Ayaz Khan, for the Applicant.
Mr. S.R. Agarkar, APP, for the Respondent/State.
Mr. Santosh Salunkhe, PI, ANC, Worli Unit.

CORAM : N. J. JAMADAR, J.
DATE : APRIL 30, 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 C.R. No. 62 of 2021 registered with Anti Narcotic Cell, Worli Unit for the offences punishable under sections 22(c), 21(b) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act, 1985) seeks to be enlarged on bail.
3. On 16th July, 2021, ANC police, Worli unit were patrolling near Paradise Cinema, Bhagoji Kir Marg, Mahim, Mumbai. The applicant was found waiting for someone. The acts and movements of the applicant appeared suspicious. After noticing the police party, the applicant tried to flee away. He was accosted. He was apprised of his right to be searched before the nearest Magistrate or gazetted

officer. The applicant declined to avail the said right. In the personal search of the applicant, a plastic bag which the applicant was carrying was found. Another a small transparent plastic bag stapled with pin was found in the first bag. It contained a white substance. It appeared to be Mephedrone (MD). It weighed 70 gms. The contraband substance was seized and samples were collected and marked A1 and A2.

4. The applicant disclosed that he had procured the said contraband from Nikhil Malkarnekar (accused No. 2). The applicant led the police party to the house of Nikhil Malkarnekar (accused No. 2). Nikhil Malkarnekar (accused No. 2) was also accosted. After apprising Nikhil Malkarnekar (accused No. 2) of his right under section 50 of the Act, in the search of accused No. 2, 120 gms MD and 15 gm Cocaine were found. The contraband substances were seized and samples were collected.

5. Mr. Mishra, the learned counsel for the applicant, submitted that there is complete non-compliance of the provisions contained in section 52A of the NDPS Act, 1985. The FIR and the panchanama indicate that the samples were collected at the time of seizure in breach of the mandate contained in section 52A of the NDPS Act, 1985. Inviting attention of the Court to the CA reports (page 21 and 23), it was submitted that the CA reports are based on the

samples which were collected at the time of seizure and forwarded on 19th July, 2021 and therefore the CA reports are bereft of any evidentiary value.

6. Mr. Agarkar, learned APP resisted the prayer for bail. It was submitted that the commercial quantity of contraband substance was found from the possession of both the applicant and Nikhil Malkarnekar (accused No. 2). As the applicant had led the police party to Nikhil Malkarnekar (accused No. 2) and the search of Nikhil Malkarnekar (accused No. 2) resulted in recovery of commercial quantity of contraband, the provision under section 29 of the NDPS Act, 1985 are clearly attracted. Resultantly, the bar under section 37 of the NDPS Act, 1985 would operate with full force and vigor. Therefore, the applicant does not deserve to be enlarged on bail. The learned APP, however, fairly submitted that there is non-compliance of the provisions contained in section 52A of the NDPS Act, 1985.

7. From the perusal of seizure panchanama, it becomes evident that the samples of the contraband allegedly seized from the applicant were marked A1 and A2 and the samples of the contraband seized from Nikhil Malkarnekar (accused No. 2) were marked B1 and B2 (MD) and C1 and C2(Cocaine). The forwarding letter dated 19th July, 2021 indicates that the sample of MD (A1)

allegedly seized from the applicant was forwarded for analysis on 19th July, 2021. The C.A report dated 21st October, 2021 (page 21) indicates that the sample (A1) was received on 19th July, 2021 and MD was detected in the said exhibit. Evidently, the CA report is based on the analysis of the sample collected at the time of the seizure.

8. The investigating officer does not seem to have conducted the inventory of the articles seized from the accused, and got the said inventory certified by, and samples drawn before, the jurisdictional Magistrate. In a line of decisions, the Supreme Court has held that the drawing of the samples at the time of seizure is not envisaged by the provisions contained in the NDPS Act, 1985. The provisions contained in section 52A of the NDPS Act, 1985 have been held to be mandatory.

9. A profitable reference in this context can be made to the decision of the Supreme Court in the case of **Union of India V/s. Mohanlal and Anr.**¹, wherein 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

1 (2016) 3 SCC 379

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.”

10. In the case of Yusuf @ Asif V/s. State², 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

2 Cri.Appeal 3191 of 2023 Dt.13/10/2023.

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.”

11. In the case of Simaranjit Singh V/s. State of Punjab³, 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 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.

12. The case at hand, is of total non-compliance of the section 52A. In the absence of the said exercise of the certification of the inventory and drawing of the samples before the jurisdictional Magistrate, there would be no primary evidence and the CA report, on which the prosecution banks upon would be bereft of any evidentiary value.

13. Thus the prosecution will have to surmount the hurdle of total non-compliance of the section 52A of the NDPS Act, 1985. Resultantly, I am impelled to hold that the applicant/accused may

3 2023 SCC Online SC 906.

not be guilty of the offence for which he has been arraigned. The Court is not informed that the applicant has antecedents. Hence, the Court may be justified in drawing a further inference that the applicant will not indulge in identical offences if enlarged on bail. Thus the interdict contained in section 37 of the NDPS Act, 1985 may not be attracted.

14. For the foregoing reasons, I am impelled to allow the application.

Hence, the following order.

ORDER

1] The application stands allowed.

2] The applicant be released on bail in C.R. No. 62 of 2021 registered with Anti Narcotic Cell, Worli Unit, 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 Anti Narcotic Cell, 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.)