

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 590 OF 2023

SANTOSH  
SUBHASH  
KULKARNI

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Kamlesh Harichand Rajpurohit

...Applicant

**Versus**

The State of Maharashtra

...Respondent

Mr. Anil Lalla, a/w Aryan Kotwal, i/b Lalla & Lalla, for the  
Applicant.

Mr. Shailesh Ghag, APP for the State/Respondent.

Mr. Sachin Palve, PSI ANC, Ghatkopar, Mumbai, present.

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

**DATED: 18<sup>th</sup> MARCH, 2024**

**ORDER:-**

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in NDPS Special Case No.150 of 2022, arising out of CR No.75 of 2021 registered with Anti Narcotic Cell ("ANC"), Mumbai, for an offence punishable under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, ("NDPS Act") has preferred this application to enlarge him on bail.
3. On 24<sup>th</sup> August, 2021 specific information was received by PSI Patil that a person, whose features were described, was to come at Mith Chowky Bus Stop, Link Road, Malad (West), Mumbai, on 24<sup>th</sup> August, 2021 between 11.30 pm to 11.55 pm.

After complying with the statutory requirements under Section 42 of the NDPS Act, the police party conducted a surveillance. At about 11.55 pm the applicant, whose features matched with the features given by the informant, came near Mith Chowky Bus Stop carrying a black plastic bag. His movements appeared to be suspicious. He was accosted. The applicant was apprised of his right under Section 50 of the NDPS Act, 1985. The applicant declined to avail the said right. Thereupon the search of the applicant was conducted. In the black plastic bag, which the applicant was carrying, another plastic bag was found. The said plastic bag contained a off-white substance. It was tested with the field testing kit. It turned out to be Mephedrone (MD). It weighed 105 gm. Contraband article was seized and samples were collected. The applicant was arrested on 25<sup>th</sup> August, 2021.

4. Mr. Lalla, the learned Counsel for the applicant, submitted that the search and seizure is vitiated as there is non-compliance of the mandate contained in Section 42 of the NDPS Act, 1985. The specific information was allegedly received by PSI Patil. However, PSI Patil had neither taken down information in writing nor forwarded its copy to his immediate official superior. The said infirmity is fatal to the prosecution.

Secondly, there is non-compliance of the provisions contained in Section 52A of the NDPS Act, 1985. Therefore, the interdict contained in Section 37 of the NDPS Act, 1985 would not operate. Thus, the applicant deserves to be enlarged on bail.

5. As against this, Mr. Ghag, the learned APP, submitted that there is compliance of all the statutory requirements including provisions contained in Sections 42 and 50 of the NDPS Act, 1985. Since the applicant was found in possession of the commercial quantity of MD, the bar contained in Section 37 of the NDPS Act, 1985 operates with full force and, therefore, the applicant cannot be released on bail.

6. I have perused the report under Section 173 of the Code of Criminal Procedure, 1973 ("the Code") and the documents annexed with it, the averments in the application and the affidavit-in-reply filed on behalf of the respondent.

7. In view of the provisions contained in Section 37(1)(b)(ii), a person accused of an offence punishable under the Act involving commercial quantity cannot be released on bail unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty and that he is not likely to commit any offence while on bail. The term "reasonable ground" has been

construed to mean something more than *prima facie* ground. It connotes substantial probable cause for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged (*Union of India vs. Shiv Shanker Kesari*<sup>1</sup>).

8. Mr. Lalla submits that bar under Section 37 of the NDPS Act, may not be attracted in this case as there is clear breach of the mandatory provisions contained in Section 42 of the NDPS Act, 1985 in as much as the person, who had received the information had not taken it down in writing and forwarded a copy thereof to his immediate official superior. Attention of the Court was invited to the appraisal memo, purportedly under Section 42(2) of the NDPS Act, 1985 dated 24<sup>th</sup> August, 2021 (page 27). It appears that the said memo was sent by Mr. Farid Khan, the then API, to the Assistant Commissioner of Police, ANC, Mumbai. The said appraisal memo explicitly records that the informant had given a specific information to PSI Mr. Patil. Evidently, PSI Mr. Patil had not sent copy of the information which Mr. Patil had recorded into writing.

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<sup>1</sup>(2007) 7 SCC 798.

9. The learned APP attempted to wriggle out of the situation by affirming that an entry was made in the station diary at 6.35 pm. by PSI Patil about the said specific information. Even if the prosecution case is construed rather generously, *prima facie*, it does not appear that there is a compliance of the provisions contained in Section 42(2) of the NDPS Act, 1985. Mr. Lalla invited the attention of the Court to the decision of the Supreme Court in the case of *Directorate of Revenue and another vs. Mohammed Nisar Holia*<sup>2</sup> wherein the Supreme Court, *inter alia*, observed that, in the facts of the said case, the statutory requirements had not been complied with as the person, who had received the first information, did not reduce the same in writing. An officer, who received such information was bound to reduce the same in writing and not the person who heard thereabout.

10. Reliance was also placed on an order passed by this Court in the case of *Sanobar Shafiq Khotwal vs. State of Maharashtra*<sup>3</sup>, wherein it was enunciated that one who receives the information must forward it to the superior himself, since there was clear infraction of the said provision, the Court was inclined to accept the submission of breach of Section 42(2),

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<sup>2</sup>(2008) 2 Supreme Court Cases 370.

<sup>3</sup>BA/3337/2021, dtd.14/10/2022.

and *Mehadi Munavar Majid vs. State of Maharashtra*<sup>4</sup>, wherein in the context of the breach of Section 42(2) of the NDPS Act, 1985 it was held that it was imperative to follow the statutory mandate, while the search was taken out, and any lacunae therein would yield to the benefit of the accused.

11. Attention of the Court was also invited to a number of orders passed by this Court, wherein in the backdrop of the non-compliance of Section 42 of the NDPS Act, 1985, this Court has granted bail.

12. It would be profitable to make a reference to the decision of the Supreme Court in the cases of *Sarija Banu & Anr. vs. State*<sup>5</sup>, wherein the Supreme Court enunciated that compliance of Section 42 was mandatory and that was a relevant fact to be taken into account while considering the bail application.

13. In the case at hand, *prima facie* there is non-compliance of the mandate contained in Section 42(2) of the NDPS Act, 1985, as PSI Patil, who had received the information did not comply with the mandate of sub-section (2) of Section 42 of the NDPS Act, 1985 by forwarding a copy of the information recorded by him to his immediate official superior. As held by

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<sup>4</sup>BA/3493/2021, dtd.14/10/2022.

<sup>5</sup>(2004) 12 SCC 266.

the Supreme Court and this Court in the aforesaid pronouncements, such a lacuna inures to the benefit of the accused.

14. On the second count of the non-compliance of the mandate contained in Section 52A of the NDPS Act, 1985, the applicant – accused stands on an even better footing. Evidently, from the perusal of the seizure panchnama it becomes abundantly clear that the samples were collected at the time of the alleged seizure itself. It does not appear that any inventory of the contraband articles allegedly recovered from the applicant was conducted before the jurisdictional Magistrate. Thus, there is a complete non-compliance of the provisions contained in Section 52A of the NDPS Act, 1985.

15. In the case of *Yusuf @ Asif vs. State*<sup>6</sup>, the Supreme Court after adverting to the provisions of Section 52A of the NDPS Act, 1985 and its earlier decision in the case of *Union of India vs. Mohanlal and Anr.*<sup>7</sup> enunciated the law, *inter alia*, as under:

“12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the

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<sup>6</sup>Criminal Appeal No.3191/2023.

<sup>7</sup>(2016) 3 SCC 379.

purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under sub-sections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of subsection (2) of Section 52A of the NDPS Act.

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15. In *Mohanlal's* case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

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"

(emphasis supplied)

16. In the case of *Simarnjit Singh vs. State of Punjab*<sup>8</sup>, the Supreme Court again adverted to the decision in the case of *Mohanlal* (supra) and considering the facts in the case of

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<sup>8</sup>2023 SCC OnLine SC 906.

*Simarnjit* (supra), observed that the act of PW-7 of drawing samples from all the packets at the time of seizure is not in conformity with the law laid down by the Supreme Court in the case of *Mohanlal* (supra). This creates a serious doubt about the prosecution's case that substance recovered was a contraband.

17. In the latest pronouncement in the case of *Mohammed Khalid and another vs. The State of Telangana*<sup>9</sup>, the Supreme Court observed in emphatic terms that since no proceedings under Section 52A of the NDPS Act, 1985 were undertaken by the Investigating Officer for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate, the FSL report is nothing but a waste paper and cannot be read in evidence.

18. Since *Mohanlal* (supra) constitutes the edifice of the aforesaid enunciation, it may be apposite to extract the observations of the Supreme Court in paragraph 17 of the judgment in the case of *Mohanlal* (supra), which read as under:

“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

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<sup>9</sup>Criminal Appeal No.1610/2023, dtd.1/3/2024.

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. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.”

(emphasis supplied)

19. On account of the non-compliance of Section 42(2) and Section 52A of the NDPS Act, 1985, the Court would be justified in drawing an inference that there is a substantial probable cause to believe that the accused may not be guilty of the offence under NDPS Act for which he has been arraigned. The Court is not informed that there are antecedents. Thus, the twin conditions envisaged by Section 37(1)(b)(ii) can be said to have been satisfied.

20. The applicant has been in custody since 25<sup>th</sup> August, 2023. Having regard to large pendency of the cases, it is unlikely that the trial can be concluded within a reasonable period. I am, therefore, persuaded to exercise the discretion in favour of the applicant.

21. Hence, the following order:

**: O R D E R :**

- (i) Application stands allowed.
- (ii) The applicant be released on bail in NDPS Special Case No.150 of 2022, arising out of CR No.75 of 2021 registered with Anti Narcotic Cell ("ANC"), Mumbai, on furnishing a PR Bond of Rs.1,00,000/- with one or two sureties in the like amount to the satisfaction of the learned Special Judge.
- (iii) The applicant shall mark his presence at the ANC, Mumbai, on the first Monday of every month between 10.00 am. to 12.00 noon for the period of three years or till conclusion of the trial, whichever is earlier.
- (iv) The applicant shall not tamper with the prosecution evidence. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any police officer.
- (v) On being released on bail, 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.
- (vi) The applicant shall not indulge in identical activities for which he has been arraigned in this case.

(vii) The applicant shall regularly attend the proceedings before the jurisdictional Court.

(viii) 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 stands disposed.

[N. J. JAMADAR, J.]