

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.873 OF 2024

Abdul Ajij Abdul Hamid Shaikh ...Applicant

vs.

The State of Maharashtra ...Respondent

Mr. Kamlesh Satre a/w. Mr. Vikas Chavan, Mr. Nilesh Bangar, for
the Applicant.

Mr. R.M. Pethe, APP, for the Respondent/State.

Mr. Santosh Salunkhe, API, ANC, Worli.

CORAM : N. J. JAMADAR, J.

DATE : APRIL 08, 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. 18 of 2021
registered with Anti Narcotic Cell for an offence punishable under
sections 22(c) read with 8(c) of the Narcotic Drugs and
Psychotropic Substances Act, 1985 (the NDPS Act, 1985) seeks to
be enlarged on bail.

3. On 13th February, 2021 the Anti Narcotic Cell police were on
patrolling duty. When they reached Saibaba Nagar, 90 Ft. Road,
Dharavi, Mumbai, the applicant was found waiting for somebody, in
suspicious circumstances. When the police approached, the
applicant attempted to flee away. He was accosted. He was apprised

of his right to be searched before nearest Magistrate or gazetted officer. As the applicant declined to avail the said right, in the presence of panch witness, search of the applicant was conducted. A plastic bag was found in the possession of the applicant. It contained another plastic pouch. The said plastic pouch contained white powder. It appeared to be Mephedrone (MD). It weighed 210 gms. The samples were collected and the contraband article was seized. The applicant came to be arrested.

4. Mr. Satre, the learned counsel for the applicant, submitted that there is a complete non-compliance of the provisions contained in section 52A of the NDPS Act, 1985. The prosecution case rests on the samples allegedly collected at the time of seizure. No inventory was conducted before the learned Magistrate in accordance with the provisions contained in section 52A of the NDPS Act, 1985. Nor the samples were drawn in the presence of the learned Magistrate. Therefore, there would be no primary evidence before the Court at the stage of trial. Even otherwise, the applicant has been in custody for more than three years. It is very unlikely that the trial can be concluded within a reasonable period. Hence, the applicant deserves to be enlarged on bail.

5. In opposition to this, Mr. Pethe, learned APP submitted that the applicant was found in possession of commercial quantity of the

contraband. Hence, the interdict contained in section 37 of the NDPS Act, 1985 comes into play. Mr. Pethe placed reliance on the decision of the Supreme Court in the cases of **State of Kerala and Others vs. Rajesh and Others**¹ and **Mohd Zahid vs. State**² to draw home the point that the offences punishable under NDPS Act, 1985 are of grave nature and the accused cannot be released on bail unless the twin test envisaged by section 37(i)(b)(ii) of the NDPS Act, 1985 is satisfied.

6. Mr. Pethe submitted that on 26th March, 2024, inventory was conducted before the jurisdictional Magistrate in compliance with the provisions contained in section 52-A(2) of the NDPS Act, 1985. A strenuous effort was made to persuade the Court to hold that non-compliance of section 52A of the NDPS Act, 1985 does not necessarily lead to an inference that the accused may not be guilty of the offence punishable under the NDPS Act, 1985. It was further urged that the applicant is a history-sheeter and as many as 14 crimes have been registered against the applicant. Therefore, in any event, the second condition envisaged by section 37(1)(b)(ii) of the NDPS Act, 1985 cannot be said to be fulfilled.

7. From the perusal of the panchanama, it becomes evident that the applicant was allegedly found in possession of 210 gms of MD.

1 (2020) 12 Supreme Court Cases 122.

2 (2022) 12 Supreme Court Cases 426.

The panchanama records that out of the said bulk of contraband, two samples of 5 gm each were collected and labeled A1 and A2. The forwarding letter (page 72) indicates that one of the sample i.e. A1 was forwarded to C.A for analysis on 15th February, 2021. Evidently, the prosecution case rests on the C.A report based on analysis of the sample collected at the time of the alleged seizure.

8. In a line of decisions, the Supreme Court has emphasized that collection of the samples of contraband article at the time of seizure itself is not envisaged by the provisions contained in NDPS Act, 1985. The provisions contained in section 52A of the NDPS Act, 1985 have been held to be mandatory in nature. 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.³, 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 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

3 (2016) 3 SCC 379

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.”

9. In the case of Yusuf @ Asif V/s. State⁴, 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 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.”

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

10. In the case of Simaranjit Singh V/s. State of Punjab⁵, 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.

11. In the face of the aforesaid enunciation of law, I am afraid to accede to the submissions of Mr. Pethe that non-compliance of the provisions contained in section 52A of the NDPS Act, 1985 does not detract materially from the prosecution.

12. As is evident from own showing of the prosecution the inventory was conducted after more than three years of the date of seizure. At any rate, the prosecution case rests on the C.A report based on the analysis of the sample collected at the time of alleged seizure. In the case of **Mohd. Khalid** (supra), the Supreme Court observed, inter alia, as under:-

22] Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report(Exhibit P-11) is nothing but a

5 2023 SCC Online SC 906.

waste paper and cannot be read in evidence. The accused A-3 and A-4 were not arrested at the spot. The offence under Section 20(b)(ii)(c) deals with production, manufacture, possession, sale, purchase, transport, import or export of cannabis. It is not the case of the prosecution that the accused A-3 and A-4 were found in possession of ganja. The highest case of the prosecution which too is not substantiated by any admissible or tangible evidence is that these two accused had conspired sale/purchase of ganja with A-1 and A-2. The entire case of the prosecution as against these two accused is based on the interrogation notes of A-1 and A-2.

(emphasis supplied)

13. The Supreme Court has enunciated that the CA report based on the samples which were not drawn in the presence of the Magistrate is bereft of any evidentiary value.

14. In this view of the matter, I am inclined to hold that in the absence of the inventory and collection of the samples before the learned Magistrate and certification thereof, within a reasonable period of alleged seizure, the prosecution will have to surmount the impediment of non-compliance of section 52A of the NDPS Act, 1985. Thus, the Court may be justified in drawing an inference that the applicant may not be guilty of the offence punishable under section 22(c) of the NDPS Act, 1985.

15. I have perused the report submitted by the investigating officer, which indicates that a number of crimes primarily under the Penal Code and Maharashtra Police Act, 1951 have been registered against the applicant. However, the applicant has not at all been arraigned, in the past, for an offence punishable under NDPS Act,

1985. The satisfaction of the Court that the applicant will not indulge in identical offence if released on bail is qua the offences under the NDPS Act, 1985. Therefore, in my view, the applicant's antecedents are not such as to dissuade the Court from releasing the applicant on bail.

16. Reliance placed by Mr. Satre on an order passed by this Court in the case of **Umer Usman Khan vs. State of Maharashtra in BA No. 3521 of 2019** dated 21st February, 2023 wherein the following observations were made, appears to be well founded.

7] There are as many as 16 criminal antecedents against the applicant. None of the antecedents are under the NDPS Act. In this view of the matter, there does not appear any possibility that the applicant will indulge in a similar offence in future. Apart from what is stated hereinbefore, it also needs to be considered that the applicant is in custody for more than 3 years and 11 months. The investigation is complete and the charge-sheet has been filed. The trial is not yet commenced and even the charge has not been framed so far. The trial is likely to take a long time to conclude. The applicant can be released on bail by imposing some stringent conditions.

(emphasis supplied)

17. The applicant has been in custody for more than three years. It is unlikely that the trial can be concluded in near future. It is well recognized that a prolonged period of incarceration without a real prospect of expeditious conclusion of the trial melts down the statutory restrictions in the matter of grant of bail. On this count also the applicant deserves exercise of discretion.

Hence, the following order.

ORDER

- 1] The application stands allowed.
- 2] The applicant Abdul Ajij Abdul Hamid Shaikh be released on bail in C.R. No. 18 of 2021 registered with Anti Narcotic Cell, 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 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.)