

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 982 OF 2024

SANTOSH
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Date: 2024.03.14
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Zakir Murtuza Shaikh

...Applicant

Versus

State of Maharashtra through ANC Azad
Maidan Unit

...Respondent

Mr. Prerak Sharma, a/w Sahil Shah, Nihir Dedhia, Aporva
Khandeparkar, for the Applicant.

Mrs. Geeta Mulekar, APP for the State/Respondent.

PSI S. R. Salunkhe, Kurar Police Station, present.

CORAM: N. J. JAMADAR, J.

DATED: 8th MARCH, 2024

ORDER:-

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.933 of 2022 arising out of CR No.13 of 2022 registered with Anti Narcotic Cell (ANC) Mumbai, for the offences punishable under Sections 22(c) read with Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act, 1985"), has referred this application to enlarge him on bail.

3. On 12th February, 2022, a team of ANC was on patrolling duty at Kamathi Pura, Nagpada, Mumbai. The applicant, who has antecedents, was noticed with a handbag on his shoulder. Movements of the applicant appeared to be suspicious. It appeared that he was waiting for someone. The applicant was accosted. In the search of the handbag, in the presence of public witnesses, a transparent plastic pouch containing off-white substance was found. It appeared to be Mephedrone (MD). It weighed 160 gm. The contraband article was seized and sealed. The applicant was arrested.

4. Mr. Sharma, the learned Counsel for the applicant, submitted that there was non-compliance of the mandate contained in Section 50 of the NDPS Act, 1985. Secondly, there was an inordinate delay in sending the sample to the FSL for analysis. Thirdly, the evidence of proper and safe custody of the bulk and sample from the date of the alleged recovery till the dispatch of the sample to the FSL, is suspect.

5. Mrs. Mulekar, the learned APP, on the other hand, stoutly contested the prayer for bail. It was submitted that there is full compliance of all the statutory requirements. The prosecution case against the applicant is almost watertight. Elaborating the submission, Mrs. Mulekar would

urge that the compliance of Section 50 of the NDPS Act was not warranted as the person of the applicant was not searched. Secondly, on the very next day of the recovery a requisition was sent to the learned Magistrate for an inventory under Section 52A of the NDPS Act, 1985 and the inventory has been duly carried out as is evidenced by the certificate issued by the learned Magistrate under subsection (2) of Section 52A of the NDPS Act, 1985. It was further submitted that there is material which indicates that immediately after recovery, the sample was lodged with the *malikhana* and retrieved for the purpose of inventory and, thereafter, for forwarding the sample to the FSL.

6. 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. Shivshankar Kesari*¹).

7. Whether the aforesaid twin test is satisfied in the case at hand? *Prima facie*, it appears that the applicant was apprehended while carrying a handbag. The FIR and the seizure memo clearly indicate that only the search of the bag which the applicant was carrying, was conducted. It was not a case of personal search. Thus, the question of compliance of the mandate contained in Section 50 of the NDPS Act, 1985 does not arise.

8. Even if it is assumed that the person of the applicant was subsequently searched, the alleged non-compliance of Section 50 of the NDPS Act, 1985 does not advance the cause of the applicant as in that event also the compliance of Section 50 is not warranted. In the case of *State of Punjab vs. Baljinder Singh and another*², the Supreme Court clarified the position that if the vehicle or article carried by the suspect is searched and recovery of contraband pursuant

1 (2007) 7 SCC 798.

2 (2019) 10 SCC 473.

thereto stands proved, merely because there was non-compliance of Section 50 of the NDPS Act, 1985 as far as, “personal search” was concerned, no benefit can be extended so as to invalidate the effect of recovery from search of the vehicle. Thus, the ground of non-compliance of Section 50 of the NDPS Act cannot be urged.

9. The ground of absence of material to show the proper and safe custody of contraband article, post recovery, also does not carry much conviction. There are documents which indicate that on 12th February, 2022 itself the contraband and incriminating article recovered from the applicant was deposited with the *malkhana*, the contraband article was retrieved from the *malkhana* on 17th March, 2023 and, post inventory, it was again deposited in the *malkhana* and, later on, only the sample (A1) collected before the learned Magistrate, was taken out of the *malkhana* on 21st March, 2022, the day it was forwarded to FSL. *Prima facie*, the ground of absence of material to show proper and safe custody does not merit acceptance. In any event, that would be a matter for trial.

10. Indeed, the sample was forwarded to FSL on 21st March, 2022, though the recovery was allegedly effected on 11th

February, 2022. However, there is material to show, on very next day of the recovery, requisition was forwarded to the learned Magistrate to have the inventory of the seized article. The learned Magistrate, it appears, had directed the investigating agency to carry out the exercise of inventory on 17th March, 2022. In the circumstances where the investigating agency had taken steps to have the inventory of the contraband article almost instantaneously, the delay in forwarding sample cannot be attributed to the investigating agency. At any rate, in the facts and circumstances of the case, the ground is not such that the Court can hold that there is substantial probable ground to hold that the accused has not committed the offence for which he has been charged.

11. Therefore, in my view, the interdict contained in Section 37(1)(b)(ii) operates with full force. Hence, the application deserves to be rejected.

12. Thus, the following order:

: O R D E R :

(i) Application stands rejected.

(ii) 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.

[N. J. JAMADAR, J.]