

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.1147 OF 2024

Mohammad Sharif Abdul Hafiz Shaikh @ Papa ...Applicant

vs.

The State of Maharashtra ...Respondent

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PAREKAR

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Mr. Lochan Chandka, for the Applicant.

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

CORAM : N. J. JAMADAR, J.

DATE : MARCH 21, 2024

P.C.:

1. Heard the learned counsel for the parties.

2. The applicant who is arraigned in C.R. No. 89 of 2023 registered with Shil Daighar police station for the offences punishable under sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, 1985) has preferred this application to enlarge him on bail.

3. On 1st March 2023, specific information was received by Anti-Narcotic Cell Crime Branch, Thane that a person whose features were described was to come in front of Vipul Lodge, Dahisar-Mori, Panvel Road to sell Mephedrone (MD). The police conducted a surveillance. At about 7.30 pm, co-accused Kamar, whose features matched the description, came in front of Vipul Lodge. He was

accosted. He was apprised of his right to be searched before the Magistrate or gazetted officer. Thereafter, in the personal search of the accused Kamar, a black polythene bag containing a light yellowish crystal powder was found. It appeared to be MD. It weighed 55.3 gms. The contraband article was seized. Samples were collected.

4. During the course of investigation, it transpired that co-accused Kamar had procured the contraband from the applicant. Thus, on 5th March 2023 at about 3.15 am, the applicant was apprehended from Hotel Murud Plaza at Murud District, Raigad. In the search of the applicant, no contraband was found. However, on 6th March 2023, the applicant made a disclosure statement and volunteered to point out the place where he had stored the balance 50 to 60 gms MD, after supplying the contraband to co-accused Kamar. The applicant allegedly led the police party to the parking lot of Hotel Murud Plaza and pointed out 'Accord' car bearing No. MH-02-BP 2177 in which the contraband was kept. The said car belonged to Salman Khan, the absconding accused. Eventually, the door of the car was opened by calling a keysmith and 60 gms MD was recovered. The contraband was seized, and samples were collected.

5. Ms. Lochan Chandka, the learned counsel for the applicant, submitted that there is a complete non-complicity of the provisions contained in section 42 and 52-A of the NDPS Act, 1985. Since, the police allegedly obtained the information from co-accused Kamar pertaining to the alleged complicity of the applicant, it was incumbent to follow the mandate contained in section 42(2) of the NDPS Act, 1985. Secondly, the contraband was allegedly recovered from the car, over which the applicant had no control. Therefore, the recovery of the contraband cannot be fastened to the applicant. Thirdly, in both the instances of the seizure of the contraband, the samples were collected at the time of seizure itself, in breach of section 52-A of the NDPS Act, 1985. The inventory conducted on 20th March 2023 is, therefore, of no significance as samples were not drawn in the presence of the Magistrate.

6. Mrs. Mulekar, the learned APP, opposed the prayer for bail. It was submitted that as the complicity of the applicant was revealed during the course of investigation, compliance with the provisions contained in section 42(2) of the NDPS Act, 1985 was not warranted. It was further submitted that the ground of non-compliance of 52-A also does not merit countenance as inventory was carried out on 20th March 2023. Since the co-accused Kamar

as well as the applicant were found in possession of commercial quantity of MD, the bar contained in section 37(1)(b)(ii) applies with full force.

7. Evidently, the applicant was apprehended on 5th March 2023 at 3.15 am. The note of the Senior P.I. dated 4th March 2023 records that information was received regarding the presence of the applicant at Lonavala and Alibaug. This implied that the investigating agency had information envisaged by section 42(1) of the Act. Prima facie there is no material to indicate that the information was taken down and its copy forwarded to immediate superior official as warranted by section 42(2) of the NDPS Act, 1985. The reliance placed by the Ms. Lochan on an order passed by this Court in **Sushant Sambhaji Rasal vs. The State of Maharashtra**¹ appears well founded.

8. In the case of **Karnail Singh vs. State of Haryana**², the Supreme Court culled out the propositions as under:

35] In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows :

1 BA.No.1760 of 2021 Dt. 01-02-2023.

2 (2009) 8 SCC 539.

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of Section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the

official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

(emphasis supplied)

9. In the case at hand, there appears to be a total non-compliance of the provisions contained in the section 42(2) of the NDPS Act, 1985.

10. I also find substance in the submission of Ms. Lochan that the aspect of possession of the contraband article is in the arena of controversy. Evidently, the contraband was seized from the car which belonged to the Salman Khan, absconding accused. When the police party was allegedly led to the car, the key of the car was with the said absconding accused. The car was opened by using the services of a locksmith.

11. One of the inferences, which is deducible in the event of a discovery of under section 27 of the Evidence Act is that the accused knew about concealment of the object, as enunciated by the Supreme Court in the case of **Mohmed Inayatullah vs The State Of**

Maharashtra³. It is debatable as to whether, in a situation of the present nature, the applicant can be said to be in conscious possession of the contraband article in the sense that he could exercise control over the concealed substance.

12. The non-compliance of the mandate contained in section 52-A of the NDPS Act, 1985 sought to be urged on behalf of the applicant, appears to be restricted to the aspect of non-drawal of the samples before the Magistrate. It appears that the inventory was conducted on 20th March 2023. However, it doesn't appear that the samples were drawn before the Magistrate. Instead, the samples which were drawn at the time of the alleged seizure were forwarded to the FSL, as is evident from the CA report which indicates that the samples were received on 8th March 2023. Incontrovertibly, CA reports are based on the samples drawn at the time of the seizure. Suffice to note, the collection of the samples at the time of seizure is not envisaged by the provisions of the Act, 1985. (**Union of India V/s. Mohanlal and Anr.**⁴).

13. Moreover, in a recent pronouncement in the case of

3 (1976) 1 SCC 828.

4 (2016) 3 SCC 379.

Mohammed Khalid and another vs. The State of Telangana⁵ 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.

14. In the aforesaid view of the matter, on all three counts, namely, 1) non-compliance of section 42 of the Act, 1985; 2) Factum of physical and conscious possession being debatable and 3) Non-collection of the samples before the Magistrate, an inference becomes justifiable that the applicant may not be guilty of the offences for which he has been arraigned. The court is not informed that the applicant has antecedents. Thus, the Court may draw an inference that the applicant may not commit offences punishable under the Act. 1985, if released on bail.

15. I am, therefore, inclined to exercise discretion in favour of the applicant.

Hence, the following order.

5 Criminal Appeal No(S).1610/2023, dtd.1/3/2024.

ORDER

- 1] The application stands allowed.
- 2] The applicant Mohammad Sharif Abdul Hafiz Shaikh @ Papa be released on bail in C.R. No. 89 of 2023 registered with Shil Daighar police station 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 Shil Daighar police station 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.)