

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 1300 OF 2023

SANTOSH
SUBHASH
KULKARNI

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Date: 2024.02.05
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Ali Mohammed Shafi Alam Shaikh ...Applicant

Versus

The State of Maharashtra ...Respondent

Ms. Mishbaah Solkar, a/w Faiza Gawandi, for the Applicant.

Mr. S. R. Aagarkar, APP for the State/Respondent.

API Birajdar, Unit-4, Crime Branch present.

CORAM: N. J. JAMADAR, J.

DATED: 2nd FEBRUARY, 2024

ORDER:-

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in Special Case No.1145 of 2020 arising out of CR No.21 of 2020 registered with DCB CID, Unit-IV, for the offences punishable under Sections 20 and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act"), has referred this application to enlarge on bail.
3. On 1st July, 2020 pursuant to a secret information that a person named Ali, age 62 to 65 years, was to arrive at Chita Camp, Trombay, with a huge stock of heroine and ganja, to sell the same, the DCB CID, Unit IV, conducted a surveillance, accompanied by two public witnesses. At about 4.45 pm. the applicant whose features matched the description furnished by

the informer, allegedly came near metro car shed. His movements appeared suspicious. The applicant was, thus accosted at about 5.55 pm. The applicant was apprised of his right under Section 50 of the NDPS Act. In the personal search of the applicant, two plastic bags were found in his possession. In one of the bags, a brown substance was found. It appeared to be heroine. In the second bag flowering and fruiting tops of cannabis plant were found. Heroine weighted 295 grams. It was seized. Its samples were collected. Ganja weighed 2 kg. It was seized. Its samples were also collected. The applicant came to the arrested on 1st July, 2020. Post completion of investigation, charge-sheet came to be filed on 24th December, 2020.

4. Ms. Solkar, the learned Counsel for the applicant, submitted that the applicant, who is 64 years of age, is suffering from ailments. He had undergone treatment at Sir J. J. Hospital. He is in custody since more than three years. It is unlikely that the trial can be concluded within a reasonable period. Since there is total non-compliance of the mandate contained in Section 52A of the NDPS Act as the investigating agency does not claim to have prepared inventory and got the inventory certified before the Magistrate and collected the

samples of the contraband, it can be said that there is no primary evidence and, resultantly, the trial would result in an acquittal. Therefore, the further detention of the applicant is not warranted.

5. In view of the submission on behalf of the applicant that the applicant is sick, the Superintendent, Central Prison, was directed to submit a report regarding the present health status of the applicant. The prisoner's medical report submitted by the Chief Medical Officer, Taloja, Central Prison, indicates that the applicant complained of Breathlessness and Dyspnea on exertion. The Chief Medical Officer has recorded present health status of the applicant as under:

"Prisoner has been kept in Circle 5 where prison hospital is situated to monitor his vitals closely and regularly not to deteriorate his condition. He is treating accordingly for his asthma with nebulization and available medicine."

6. Mr. Aagarkar, the learned APP for the State, submitted that the condition of the applicant is not such that the applicant can claim bail on medical ground. So far as alleged non-compliance of the mandate under Section 52A of the NDPS Act, the learned APP submitted that on 1st February, 2024 the Investigating Officer has approached the jurisdictional Metropolitan Magistrate to comply with the provisions contained

in Section 52A of the NDPS Act. A copy of the application made before the learned Magistrate was tendered for the perusal of the Court.

7. On the merits of the matter, Ms. Solkar would urge that though the applicant has raised the grounds of non-compliance of the mandate contained in Sections 42 and 50 of the NDPS Act, the complete non-compliance of the mandatory provisions contained in Section 52A of the NDPS Act, for over three and half years, renders the further detention of the applicant as an under-trial prisoner wholly unwarranted.

8. Mr. Aagarkar, as noted above, made an endeavour to wriggle out of the situation by asserting that the provisions contained in Section 52A can now be complied with and, therefore, the trial can be expedited.

9. In the case of *Alpesh Kumar Suresh Kumar Jain vs. State of Maharashtra* in *BA/1485/2023*, decided on 31st January, 2024 I had an occasion to deal with the ground of non-compliance of the mandate contained in Section 52A of the Act, in a little detail. It was observed as under:

“14. Plain reading of the aforesaid provisions would indicate that when any contraband / narcotic substance is seized and forwarded to the Officer in-charge of the nearest police station or to the officer empowered under Section 53 of the Act, the Officer referred to in sub-section (1) of

Section 52-A shall prepare the inventory of contraband / narcotic substance containing details and the description of the seized substance, like quality, quantity, mode of packaging, marks, number or such other identifying particulars of the contraband or packing in which they are packed, country of origin and other particulars, as may be found relevant and make the application to any Magistrate for the purpose of certifying the correctness of the inventory so prepared and for taking photograph and certifying such photograph as true and for allowing to draw representative samples of such substance in the presence of such Magistrate and certifying the correctness of list of samples so drawn.

15. Sub-section (3) of Section 52-A enjoins the Magistrate to allow the application, as soon as may be. Sub-Section (4) of Section 52-A, which begins with non-obstante clause qua Indian Evidence Act and the Code of Criminal Procedure, 1973, provides that every Court trying an offence under the said Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

16. In the case of Union of India V/s. Mohanlal and Anr.¹ 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 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.”

17. Following the aforesaid pronouncement, in the case of Jabir Nader Ali (supra), the learned Single Judge of this Court (Bharati Dangre, J.) held that the non-compliance of Section 52-A, within a reasonable time, gives rise to an apprehension that the sample which is alleged to have been drawn and sent for analysis, could have been tampered with and in absence of certification from the Magistrate that the sample has been correctly drawn, the benefit of doubt must necessarily yield in favour of the applicant.

18. At this stage, it is necessary to make a reference to another decision of the learned Single Judge of this Court (M.S.Karnik, J.) in the case of Mukesh Rajaram Chaudhari V/s. The State of Maharashtra² wherein after an elaborate analysis of the provisions contained in the Act, 1985 and the judgments of the Supreme Court in the cases of Union of India V/s. Mohanlal (supra) and Simaranjit Singh V/s. State of Punjab³ the learned Single Judge posed a question, whether those judgments completely take away the discretion of the Court while considering the grant or refusal of the bail to an accused under the NDPS Act and the rigours of Section 37 of the Act stand lifted ?

The learned Single Judge answered the question as under :

“37. It is undoubtedly true that when the investigating agency has not followed the procedure under Section 52A of the NDPS Act, the deeming fiction of photographs, samples etc., being treated as primary evidence as provided

2 BA No.54 of 2023 dt. 27 Sept. 2023

3 2023 SCC Online SC 906

under Sub-section (4) of Section 52A would not be available. However, the question is, is this the only mode in which the prosecution can establish the charge against the accused? In this context, two scenarios are likely to arise. In both cases, let us assume that the prosecution has not followed the provisions of Section 52A and taken aid of the Magistrate in drawing the samples and sending for forensic analysis. In the first scenario, if the seized substance is still not destroyed and is available in the custody of the investigating agency, there is nothing to stop the said agency from following the full gamut of the procedure provided under Section 52A before destroying or disposing off the goods and then relying on the deeming fiction contained in Sub-section (4) of Section 52A of the NDPS Act. The only question in such a scenario would be why were such steps taken at a belated stage. Second scenario would be that the samples have been drawn, not in the presence of Magistrate and the goods have been destroyed with the permission of the Magistrate. In such a situation also, all that can happen is with the prosecution cannot avail of the deeming fiction provided in Sub-section (4) of Section 52A of the NDPS Act. This, however, does not mean that the prosecution cannot establish the charges against the accused through the means of other evidence available with it. For example, if the process of taking samples may not be in the presence of the Magistrate, but is shown to be properly followed with the aid of the support of the panch witnesses which the court finds believable and reliable, I do not see how the prosecution case would be destroyed totally. In either of the scenarios noted above, it would be eventually a question of what evidence is brought on record and how such evidence is to be evaluated. Both the aspects are in relation to conduct of trial. At the stage when the court is concerned with the question of granting or refusing bail, this cannot be the sole consideration. It may be one of the relevant considerations but cannot be the sole consideration on the basis of which the moment it is shown that the procedure under Section 52A of the NDPS Act is not followed, the accused automatically becomes entitled to bail as a matter of right. The rigors of Section 37 of the NDPS Act would continue to apply. Only when the bail court is satisfied that reasonable grounds of believing that the accused is not guilty of the offence and that he is not likely to commit any offence while

on bail, the bail would be granted. I, therefore, do not find any merit in the submission of learned counsel for the applicant that in the present case non-compliance of Section 52A would entitle the applicant to bail.”

19. It must also be noted that in the case of **Jabir Nader Ali (Supra)**, this Court noted the decision in the case of **Mukesh Rajaram Chaudhari (Supra)**, and yet, in the facts of the said case, found that an endeavour was made to comply with the mandate of Section 52-A in a perfunctory manner, and, thus, exercised the discretion to release the accused therein on bail.

20. The approach adopted by this Court in the case of **Mukesh Rajaram Chaudhari (supra)**, cannot be said to be unsustainable. The endeavour of the Court was to balance the object with which the interdict contained in Section 37 of the Act, 1985 has been enacted with the imperativeness of following the mandatory provisions of the Act, 1985 which provide in built safeguard against the possibility of planting or false implication. The insistence on scrupulous compliance of the provisions which incorporate the safeguards, is premised on the stringent punishment which the offences entail and also a statutory bar in the matter of releasing the accused on bail.

21. A case of complete non-compliance of Section 52-A and the one with material to indicate that there was a substantial compliance or there was still possibility of compliance of Section 52-A of the Act, in my view, stand on different footings. It is in the aforesaid context, reference to the decisions of the Supreme Court in the case of **Yusuf @ Asif V/s. State (supra)**, and **Simaranjit Singh V/s. State of Punjab (supra)**, would be advantageous.

22. In the case of **Yusuf @ Asif V/s. State (supra)**, 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.”

23. In the case of **Simaranjit Singh V/s. State of Punjab (supra)**, 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.”

10. Reverting to the facts of the case, as of now, there is a total non-compliance of the provisions contained in Section 52A of the NDPS Act. Evidently, on 1st February, 2024, the jurisdictional Magistrate is requested to certify the inventory. A three and half years time has elapsed since the date of the alleged seizure. To what extent, the sanctity of the bulk allegedly recovered from the possession of the applicant and stored in the property room can be vouched for, would be a matter for consideration. In a situation of this nature, whether the compliance of Section 52A of the NDPS Act, at this stage, would rule out the possibility of tampering with the sample, would again be a debatable issue.

11. In the aforesaid view of the matter, the rigour contained in Section 37 of the NDPS Act may not apply with full force. There are no antecedents of the applicant. That would justify an inference that the applicant, if released on bail, will not indulge in identical offences.

12. Moreover, the applicant is in custody since 1st July, 2020. More than three years have elapsed. It is unlikely that the trial

can be completed within a reasonable period. In addition, the applicant is stated to be suffering from ailments, which require immediate medical care and attention. It is well recognized that a long period of incarceration without realistic possibility of conclusion of trial within a reasonable period, melts down the rigour of the statutory restrictions in the matter of grant of bail.

13. In a recent order, in the case of Rabi Prakash V/s. State of Odisha⁴ the Supreme Court observed as under :

“4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned Counsel for the Respondent – State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.”

14. I am, therefore, impelled to hold that, in the peculiar facts of the case, the applicant deserves to be released on bail.

15. Hence the following order:

: O R D E R :

- (i) The Application stands allowed.
- (ii) The Applicant be released on bail in Special Case No.1145 of 2020 arising out of CR No.21 of 2020 registered with DCB

⁴ 2023 SCC Online SC 1109

CID, Unit-4, on furnishing a PR bond in the sum of Rs.1,00,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.

(iii) The applicant shall mark his presence before DCB, CID Unit No.9 on first Monday of every month between 11 am to 1 pm for a period of two years or till the 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 regularly attend the proceedings before the jurisdictional Court.

(vii) 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.]