

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 1860 OF 2023

Arbaz Ahmed Ali Khan	...Applicant
Versus	
The State of Maharashtra	...Respondent

Mr. Ayaz Khan, for the Applicant.
Mrs. Geeta Mulekar, APP for the State/Respondent.
Mr. Bhushan Bendre, for the Intervener.
API Sudhir Patil, EOW, Thane City, present.

CORAM: N. J. JAMADAR, J.
DATED: 29th JANUARY, 2024

ORDER:-

1. Heard the learned Counsel for the parties.
2. By this application under Section 439 of the Code of Criminal Procedure, 1973 ("the Code"), the applicant, who is arraigned in Special Case No.762 of 2021 arising out of CR No.331 of 2021 registered with Mira Road Police Station, Mumbai, for the offences punishable under Sections 21(b) and 22(b) read with Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act") seeks to be enlarged on bail.
3. On 26th September, 2021, the police party was on a patrolling duty. In front of Hotel Vakston, the applicant was

found moving suspiciously. The applicant was accosted. He gave evasive replies. The public witnesses were summoned. As a suspicion was entertained that the applicant might be possessing contraband articles, he was searched in the presence of the public witnesses. In the search, a plastic pouch was found in the left pocket of the trouser of the applicant. The said pouch contained MD. It weighed 150 gm. The contraband article was seized and its samples were collected under a seizure panchnama. The applicant came to be arrested.

4. The applicant preferred an application for bail before the learned Special Judge, Thane. By an order dated 4th May, 2023, the learned Special Judge was persuaded to reject the application opining *inter alia* that the twin test envisaged by Section 37 of the NDPS Act was not satisfied.

5. Mr. Khan, the learned Counsel for the applicant, submitted that it is a clear case of non-compliance of the mandate contained in Section 50 of the NDPS Act. Nor the investigating agency complied with the provisions contained in Section 52A of the NDPS Act. The material on record, according to Mr. Khan, indicates that the prosecution case of seizure of contraband article from the applicant is riddled with irreconcilable inconsistencies and that justifies an inference

that the accused is not guilty of the offence. It was further submitted that there are no antecedents of the applicant, who is in custody since 26th September, 2021. Therefore, the applicant deserves to be released on bail.

6. The learned APP resisted the prayer for bail. It was submitted that there is substantial compliance with the provisions contained in Section 50 of the NDPS Act. Since the commercial quantity of contraband article was found in possession of the applicant, the applicant cannot be released on bail.

7. Non-compliance of the provisions contained in Section 50 of the NDPS Act was sought to be substantiated by making a reference to the allegations in the FIR and the assertions in the seizure panchnama. In the FIR as well as the seizure panchnama it was mentioned that a notice was given to the applicant under Section 50 of the NDPS Act and thereupon the applicant replied in Hindi verbally as well as in writing that there was no need of compliance of the provisions contained in Section 50 of the Act.

8. Mr. Khan submitted that the aforesaid assertions in the FIR and the seizure panchnama do not constitute the appraisal of the right to be searched before the Gazetted Officer or

Magistrate, as envisaged by Section 50 of the Act. Reliance was placed on the observations of the Supreme Court in the case of *T. P. Razak alias Nagappan Razak vs. State of Kerala*¹, wherein the Supreme Court observed that the absence of assertion in the FIR and the seizure memo about the accused having been asked about his right to be searched before a Gazetted Officer or Magistrate amounts to non-compliance of the provisions of Section 50 of the NDPS Act.

9. In the said case, the Supreme Court, *inter alia*, observed as under:

“6. As regards compliance with the requirements of Section 50 of the Act there is only the evidence of P.W. 4 who has deposed in the Court that before the appellant was searched he had asked the appellant whether he is to be taken before a Gazetted Officer or a Magistrate for conducting the search and that the appellant replied that it was not necessary. This fact is, however, not mentioned in the F.I.R., Ex.P.7 as well as in the Seizure Mahazar, Ex.P.I. P.W.I, the other witness of the search, also does not support the said version of P.W. 4. The trial Judge did not consider it necessary to assess the evidence since he was of the view that it was not necessary to comply with the provisions of Section 50 of the Act. The High Court has also proceeded on the basis that the provisions of Section 50 were directory and non-compliance was not fatal to the prosecution case.

7. Having regard to the fact that the F.I.R. and Seizure Mahazar do not mention about the appellant having been asked before the search was conducted as to whether he would like to be produced before a Gazetted Officer or a Magistrate and the further fact that P.W.I, the other independent witness, also does not state about this we are of the view that the prosecution has filed to establish that there was compliance with the provisions of Section 50 of the Act before conducting the search of the appellant. In view of the non-compliance with the mandatory provisions of

¹1995 (Sup4) SCC 256.

Section 50 of the Act no reliance can be placed on the alleged search of the person of the appellant and the alleged recovery of four small packets containing 370 mg. of brown sugar from his possession. The conviction and the sentence imposed on the appellant cannot, therefore, be upheld and has to be set aside.”

(emphasis supplied)

10. The learned APP attempted to salvage the position by inviting the attention of the Court to the appraisal memo (page 30 of the application). The appraisal memo sought to be relied upon by the learned APP, further confounds the confusion. The said appraisal memo indicates that it was prepared and served on 29th June, 2021, whilst the search was allegedly conducted on 26th September, 2021. Secondly, it records that there was a concrete information that the applicant was in possession of contraband article. Whereas the FIR proceeds on the premise that it was a case of chance recovery during the course of patrolling. The learned APP attempted to wriggle out of the situation by submitting that, according to her instructions, there was a typographical error.

11. There are other circumstances which throw a cloud of doubt over the search. The alleged search and seizure operation took place between 16.45 pm. to 18.50 pm. on 26th September, 2021. Yet, the FIR came to be registered on 27th September, 2021 at about 3.00 am. Secondly, in the forwarding letter addressed to the FSL, it was mentioned at a number of places that the

contraband was seized on 27th September, 2021 at about 16.30 pm. The deposit slip of the muddemal property however again records that seizure was effected on 26th September, 2021.

12. At this stage, these discrepancies and inconsistencies, can be ignored as being the matters for trial. However, the clear non-compliance of the mandate contained in Section 50 of the NDPS Act cannot be brushed aside lightly. Both the FIR and the seizure memo do not, in terms, record that the applicant was apprised of his right to be searched before the Gazetted Officer or Magistrate. The parole evidence sought to be pressed into service in the form of communication (page 30) also does not advance the cause of the prosecution as it seems to have been given few months prior to the alleged search.

13. Having regard to the stringent punishment which the offences under NDPS Act entail and restrictions in the matter of grant of bail, these factors cannot be wished away as inadvertent omission or typographical errors. It would be suffice to make a reference to the Constitution Bench judgment of the Supreme Court in the case of *Vijaysinh Chandubha Jadeja vs. State of Gujarat*², wherein the Supreme Court enunciated that the concept of “substantial compliance” with the requirement of

² 2011(1) SCC 609.

Section 50 of the NDPS Act introduced and read into the mandate of the said Section in *Joseph Fernandes vs. State of Goa*³ and *Prabha Shankar Dubey vs. State of M.P.*⁴, *Krishna Kanwar vs. State of Rajasthan*⁵ is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in *State of Punjab vs. Baldev Singh*⁶. In *Baldev Singh* (supra) the Supreme Court emphasized that in so far as the obligation of the authorized officer under sub-section (1) of Section 50 of the NDPS Act is concerned it is mandatory and requires strict compliance. Failure to apply that provision would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article with the person of the accused during such search.

14. Since there is a clear non-compliance of the mandate of Section 50 of the NDPS Act, I am impelled to hold that *prima facie* the search is vitiated and, therefore, an inference becomes justifiable that the applicant may not be guilty of the offence punishable under NDPS Act, for which he has been charged.

³(2000)1 SCC 707.

⁴(2004) 2 SCC 56.

⁵(2004) 2 SCC 608.

⁶(1999) 6 SCC 172.

The Court is informed that there are no antecedents of the applicant. It is, therefore, unlikely that the applicant will indulge in identical offences, if released on bail.

15. The applicant is in custody since 27th September, 2021. Having regard to large pendency of cases, it is unlikely that the trial can be concluded within a reasonable period.

16. Hence, the following order.

: O R D E R :

- (i) Application stands allowed.
- (ii) The applicant Arbaz Ahmed Ali Khan be released on bail in Special Case No.762 of 2021 arising out of CR No.331 of 2021 registered with Mira Road Police Station, Mumbai, on furnishing a P.R. Bond of Rs.1,00,000/- with one or more sureties in the like amount to the satisfaction of the learned Special Judge.
- (iii) The applicant shall mark his presence at the Mira Road police station on the first Monday of every month in 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 any 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.]