



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.1754 OF 2023**

Eze John	...	Applicant
versus		
Union of India and Anr.	...	Respondents

Mr. Taraq Sayed with Ms. Ashwini Achari, for Applicant.
Mrs. Aruna S. Pai, Spl. P.P. for Respondent No.1.
Mr. Prashant Jadhav, APP for State.

CORAM: N.J.JAMADAR, J.

DATE : 4 APRIL 2024

P.C.

1. Heard the learned Counsel for the parties.
2. The applicant who is arraigned in F.No.NCB/MZU/CR-92/2021 for the offences punishable under Sections 21(b), 22(c), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has preferred this application to enlarge him on bail.
3. A specific information was received by an Intelligence Officer of NCB on 28 September 2021 that – a foreign national, whose features were described was to come opposite to Vicino Mall, New Link Road, Oshiwara, Andheri (West), Mumbai, between 2.00 a.m. to 4.00 a.m., of that night to deliver Mephedrone (MD) and Cocaine to someone. The information was reduced into writing and conveyed to the immediate official superior. A surveillance was conducted. At about 3.00 a.m., the applicant, whose features matched the description given by the informant, arrived
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thereat. The applicant was accosted. The applicant identified himself as Eze John, a Nigerian national.

4. It is alleged, the applicant upon being apprised of the purpose of the trap, took out two transparent zip locked polythene pouchs. First pouch contained white coloured crystalline substance and the second pouch contained five red coloured small round shape substances. White substance in the first pouch was tested with the help of drug detention kit and it turned out to be MD. It weighed 64 gms. The Investigating Officer removed the cover of the round shape substances. White powder was concealed therein. When the said powder was tested with the drug detention kit, it showed positive for cocaine. It weighed 03 gms. Contraband articles were seized and labelled. A mobile phone handset with two simcards was also recovered from the possession of the applicant. The applicant was arrested.

5. As the learned Special Judge declined to exercise discretion in favour of the applicant, this application for bail.

6. An affidavit in reply is filed on behalf of NCB to oppose the prayer for bail.

7. I have heard Mr. Sayed, learned Counsel for the Applicant, and Mrs. Pai, learned Special P.P., for the Respondent No.1.

8. Mr. Sayed, learned Counsel for the Applicant, mounted a slew of challenges to the search and seizure of the contraband articles from the applicant. It

was submitted that there was non-compliance of the provisions contained in Section 42 of the Act. There is a discrepancy in the timeline which finds mention in the information note, which was of 28 September 2021, and the seizure panchanama dated 29 September 2021. Most importantly, according to Mr. Sayed, there was a complete non-compliance of the mandate contained in Section 50 of the Act. The applicant was not at all apprised of his right to be searched before the nearest Magistrate or Gazetted Officer. Panchanama is completely silent about the appraisal of the said right to the applicant. To fill in the lacuna, a notice under Section 50 of the Act, 1985, is purported to have been served on the applicant on 29 September 2021. However, the signatures of the panch witnesses do not find place on the said notice, nor the fact of such notice having been served on the applicant finds mention in the panchanama.

9. In opposition to this, Mrs. Pai submitted that none of the grounds sought to be urged on behalf of the applicant deserve consideration. Mrs. Pai laid emphasis on the fact that the applicant is a Nigerian national and has been residing in India illegally. Commercial quantity of narcotic substance was found in possession of the applicant. The interdict contained in Section 37 of the Act, 1985 is squarely attracted. The ground of non-compliance of Section 42 cannot be urged as the case is covered by the provisions contained in Section 43 of the Act, 1985. Even otherwise, there is material to show that the provisions contained in Section 42 were scrupulously complied with. To lend support to these submissions, Mrs. Pai placed reliance on the

decisions of the Supreme Court in the cases of Union of India v/s. Shiv Shankar Kesari¹, Madanlal and Anr. V/s. State of H.P.² and Karnail Singh V/s. State of Haryana³.

10. With regard to the ground of non-compliance of the provisions contained in Section 50 of the Act, in the affidavit in reply, it was contended that since the seizure was not from the person of the applicant, the provisions contained in Section 50 of the Act, are not attracted. Mrs. Pai, learned Special PP, would urge that, even otherwise, the notice under Section 50 served on the applicant (page 43 of the application) indicates that the provisions contained in Section 50 of the Act, were also fully complied with. Therefore, the applicant does not deserve to be enlarged on bail.

11. I have carefully perused the material on record and given anxious consideration to the submissions canvassed across the bar. Evidently, the case is based on prior information. Information note dated 28 September 2021 purportedly made at 4.00 p.m, records that the suspect was to deliver contraband article between 2.00 a.m. to 4.00 a.m. on that night. Prima facie, the information appears to have been reduced into writing and copy thereof was forwarded to the immediate official superior. Compliance of the provisions contained in Section 42 of the Act, prima facie, appears to have been made.

12. At this stage, I do not deem it appropriate to delve into the aspect of

1 (2007) 7 SCC 798

2 (2003) 7 SCC 465

3 (2009) 8 SCC 539

discrepancy in the time line sought to be highlighted by Mr. Sayed. That would be a matter for adjudication at the trial based on the evidence that may be adduced.

13. The alleged non-compliance of the provisions contained in Section 50 of the Act, however, deserves careful consideration. By a catena of decisions, it is firmly settled that the requirements of Section 50 of the Act are mandatory and the Officer conducting the search is enjoined to scrupulously comply with the provisions contained in Section 50 of the Act. If the search of the person is to be carried out, it is imperative for the Officer conducting the search to apprise the person intended to be searched of his right to be searched before the nearest Magistrate or Gazetted Officer. Such right would become illusory if the suspect is not clearly apprised of the said right. Therefore, it is obligatory on the part of the officer effecting the search to apprise the suspect of such a right to be searched before the Magistrate or Gazetted Officer.

14. In the case of **State of Punjab V/s. Baldev Singh**⁴ the Constitution Bench of the Supreme Court enunciated that there is, thus, unanimity of judicial pronouncements to the effect that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a gazetted officer or a Magistrate and that the failure to

4 (1999) 6 SCC 172

so inform the suspect of his right, would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50.

15. The Constitution Bench of the Supreme Court in the case of **Karnail Singh V/s. State of Haryana (supra)**, after adverting to the 2001 Amendment, whereby sub-sections (5) and (6) were introduced into Section 50 of the Act, observed, inter alia, as under :

“31. The safeguard or protection to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. But this strict procedural requirement has been diluted by the insertion of subsection (5) and (6) to the Section by Act 9 of 2001, by which the following subsections were inserted accordingly :

"50. (5) When an officer duly authorized under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

Through this amendment the strict procedural requirement as mandated by Baldev Singh's case was avoided as relaxation and fixing of the reasonable time to send the record to superior official as well as exercise of

Section 100 of CrPC was included by the legislature. The effect conferred upon the previously mandated strict compliance of Section 50 by Baldev Singh's case was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a consequence the mandate given in Baldev Singh's case is diluted."

16. In the case of Vijaysinh Chandubha Jadeja V/s. State of Gujarat⁵ another Constitution Bench of the Supreme Court observed as under :

"29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

5 (2011) 1 SCC 609

17. In the case of **Arif Khan @ Agha Khan V/s. State of Uttarakhand**⁶ the

Supreme Court enunciated the law as under :

“18. What is the true scope and object of Section 50 of the NDPS Act, what are the duties, obligation and the powers conferred on the authorities under Section 50 and whether the compliance of requirements of Section 50 are mandatory or directory, remains no more res integra and are now settled by the two decisions of the Constitution Bench of this Court in **State of Punjab vs. Baldev Singh**⁷ and **Vijaysinh Chandubha Jadeja (supra)**.

20. Their Lordships have held in **Vijaysinh Chandubha Jadeja (supra)** that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate. (See also **Ashok Kumar Sharma V/s. State of Rajasthan**⁸ and **Narcotics Control Bureau v/s. Sukh Dev Raj Sodhi**⁹)”

18. In the light of the aforesaid enunciation of law, re-adverting to the facts of the case, it is pertinent to note that the seizure panchanama is conspicuously silent

6 (2018) 18 SCC 380

7 (1999) 6 SCC 172

8 (2013) 2 SCC

9 (2011) 6 SCC 392

about the appraisal of the right of the applicant to be searched before the nearest Magistrate or Gazetted Officer. A careful perusal of the panchanama would indicate that after the applicant was accosted, the Investigating Officer had shown his identity card to the applicant and revealed his intention of personal search in connection with the recovery of contraband article. Once such an intention to carry personal search of the accused was declared, *eo instante* the right of the accused to have the search before the Magistrate or Gazetted Officer accrued to the accused.

19. Panchanama further records that upon being inquired, as to whether he was carrying any contraband items, the applicant took out two transparent zip locked polythene pouches from the packet of his jeans and handed over the same to the Investigating Officer. If the narration in the panchanama is properly construed, *prima facie*, there appears breach of the mandate contained in Section 50 of the Act, as the contraband was allegedly recovered from the person of the applicant and not any article or thing carried by the applicant.

20. An endeavour has been made by the prosecution to show that there was compliance of the mandate contained in Section 50 of the Act, by banking upon the notice purportedly given under Section 50 of the Act (page 43). I find substance in the submission of Mr. Sayed that, *prima facie*, the said notice does not advance the cause of the prosecution. The matter can be appreciated from two perspectives. One, intrinsic evidence of the notice. Two, the absence of reference to the said notice in the

seizure panchanama.

21. On the aspect of the intrinsic evidence of the notice, evidently panch witnesses have not signed the said notice. Thus, prima facie, it cannot be urged that the said notice was given to the applicant and, consequently, he was apprised of his right under Section 50 of the Act, in the presence of the panch witnesses. In ordinary course, had the notice been given during the currency of the panchanama, the panch witnesses ought to have signed the said notice. A useful reference in this context can be made to an order passed by this Court in the case of **Nadeem Abdul Rahim Choughule V/s. The State of Maharashtra**¹⁰, wherein repelling the contention of compliance of Section 50 based on such communication (of which there was no reference in the panchanama), it was observed that the said attempt appeared to be an after-thought as the communication did not bear the signatures of the panchas and in the statements of the two panchas, compiled in the chargesheet, there was no mention of such intimation having been given to the accused persons.

22. Secondly, the seizure panchanama is quite elaborate. Apart from the recovery and seizure of the contraband, the seizure panchanama also records that the mobile phone handset and two sim cards were recovered from the possession of the applicant. The applicant requested the Investigating Officer to permit him to travel along with the NCB team in the government vehicle. A notice under Section 67 of the

¹⁰ BA 1801 of 2021 dt. 14/09/2022

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Act was issued to the applicant on the spot to present before the IO forthwith to submit his say. If all these matters could be documented in the seizure panchanama, prima facie, the omission to record the fact that the notice under Section 50 of the Act, was given to the applicant, becomes contentious. The concomitant circumstance that the applicant was shown to be arrested on 29 September 2021 at about 8.00 p.m., though the seizure panchanama was concluded at about 4.00 a.m, on that day, gives heft to the submission on behalf of the applicant that the applicant was made to sign the notice (page 43) after it was realized that there was non-compliance of the mandate contained in Section 50 of the Act, 1985.

23. In view of the pronouncement of the Supreme Court in the case of **State of Punjab V/s. Baldev Singh (supra)**, the non-compliance of Section 50 of the Act vitiates the search. In the case at hand, the prosecution rests on the possession of the contraband substance. Therefore, the court may be justified in drawing an inference that the accused may not be guilty of the offence under Section 50 of the Act. The first of the twin test thus stands satisfied. The Court is not informed that the applicant has antecedents. Therefore, further inference that the applicant may not indulge in identical offence, if released on bail, also becomes justifiable.

24. Resultantly, the applicant deserves to be enlarged on bail.

25. Hence, the following order :

ORDER

- (i) The Application stands allowed.
 - (ii) The Applicant - Eze John be released on bail in C.R.No.92 of 2021 registered with Narcotic Control Bureau, Mumbai 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 Narcotic Control Bureau, Mumbai on first Monday of every alternate month between 11 am to 1 pm for a period of three 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
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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.)

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