

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2517 OF 2022

Gulzar Maqbool Khan	vs.	...Applicant
The State of Maharashtra		...Respondent

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Mr. Anil Lalla a/w. Mr.Aryan Kotwal i/b. Lalla & Lalla, for the Applicant.

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

Mr. Sachin Gawde, API, DCB CID, Unit 6, Mumbai.

CORAM : N. J. JAMADAR, J.

DATE : MARCH 13, 2024

P.C.:

1. Heard the learned Counsel for the parties.
2. The applicant, who has been arraigned for the offences punishable under Sections 8(c), 20(b)(ii)(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act, 1985) in C.R.No. 249 of 2021 registered with Dahisar police station has preferred this application to enlarge him on bail.
3. On 25th October 2021, pursuant to an intimation, Dahisar Police conducted a surveillance at Dahisar Check Post. As intimated, a Santro car bearing Registration No.DL-10/CS-4332 came on the flank of the road leading to Mumbai from Gujarat. The said vehicle was intercepted. Two males, two females and a child were boarding the said car.

4. Co-accused Bandu Udanshive, his wife Clera, daughter Sinthia, and Jasar Shaikh, son in law, identified themselves. Except the child, they were informed about their right to be searched in the presence of the Gazetted Officer or a Magistrate. During the search of the car, it was found that in the cavities of the door and dickey, 16 kgs of Charas, a contraband article, was concealed. In the personal search of the co-accused Bandu, 8 kgs Charas was also found. The contraband articles were seized. Samples were collected.

5. It transpired that the said co-accused had been transporting the contraband articles from Jammu and Kashmir and the applicant was the person who was supplying the contraband articles to the co-accused. The applicant came to be arrested on 8th January, 2022.

6. During the course of investigation, the applicant allegedly made disclosure statement and pointed the place where the applicant used to hand over the contraband articles to the co-accused. From the mobile phone which was seized from the possession of the applicant, the photographs of the contraband Charas (which were deleted by the applicant) were retrieved.

7. Mr. Lalla, the learned counsel for the applicant, submitted that apart from the statement of the co-accused, there is no material to connect the applicant with the alleged offence. Nothing was recovered from the possession of the applicant. In any event, there is non-compliance of the provisions contained in section 52A of the NDPS Act, 1985. That would eventually lead to the trial being vitiated.

8. In opposition to this, Mr. Agarkar, the learned APP resisted the prayer for bail. It was pointed that this Court has rejected the application of co-accused Jasar Shaikh by an order dated 17th January, 2024. Since, the applicant is arraigned for an offence punishable under section 29 of the NDPS Act, 1985, the fact that there was no recovery from the possession of the applicant is not of decisive significance.

9. I have perused the report under section 173 of the Code of Criminal Procedure, 1973 and the documents annexed with it.

10. Evidently, the applicant was not found in possession of the contraband articles. The prosecution presses into service the disclosure statement made by the applicant under section 27 of the

Evidence Act and the photographs of the contraband article allegedly extracted from the mobile phone of the applicant under the Extraction Panchanama (page 148). The disclosure statement allegedly made by the applicant on 14th January, 2022 does not seem to have any incriminating tendency as it does not distinctly relate to the fact thereby discovered. The applicant had voluntarily shown the place where the applicant allegedly used to hand over the contraband articles and collect money from the co-accused. That place appeared to be near the residence of the co-accused, which was within the knowledge of the police. Thus, nothing can be said to have been discovered pursuant to the disclosure statement made by the applicant.

11. Though the prosecution alleges that certain amounts were credited in the account of the applicant by the co-accused, yet, the necessary nexus between the said deposit and the illicit trade in the contraband articles could not be prima facie established. In the face of aforesaid material, at thus juncture, whether the applicant can be roped in by invoking the provisions contained in section 29 of the NDPS Act, 1985 appears debatable.

12. On the aspect of non-compliance of the provisions contained in Section 52-A of the Act, the learned Counsel for the applicant placed reliance on the decision in the case of **Union of India vs. Mohanlal and Another**¹. On an analysis of the provisions contained in section 52-A, the Supreme Court enunciated the legal position as under:-

15] It is manifest from Section 52A (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

1 (2016) 3 Supreme Court Cases 379.

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.

13. The Supreme Court has emphasized that the question of drawing of samples at the time of seizure, in the absence of the Magistrate, is not envisaged in the scheme of section 52-A of the NDPS Act, 1985. There is no provision in the Act that mandates taking of samples at the time of seizure. 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 the Magistrate, to be correct. The aforesaid pronouncement, in the case of **Mohanlal** (supra) has been followed in recent judgments the cases of **Yusuf @ Asif vs. State**²; **Simaranjit Singh vs. State of Punjab**³ and **Mohammed Khalid and Anr. vs. The State of Telangana**⁴.

14. In the case of **Yusuf** (supra) after referring to the decision of the Supreme Court in the case of **Mohanlal** (supra), the Supreme Court observed as under :-

² Cri. Appeal No. 3191 of 2023 Dt.13/10/2023.

³ 2023 SCC OnLine SC 906.

⁴ Cri.Appeal No, 1610/2023 Dt.01/03/2024.

15] In Mohanlal's case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

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.

15. In view of the above, qua the applicant, the bar under Section 37 (1)(b)(ii) may not be attracted.

16. The applicant is in custody since 8th January, 2022. Having regard to the large pendency of cases, it is unlikely that the trial can be concluded within a reasonable period. For the foregoing reasons, I am inclined to exercise the discretion in favour of the applicant.

Hence, the following order.

ORDER

- 1] The application stands allowed.
- 2] The applicant Gulzar Maqbool Khan be released on bail in C.R. No. 249 of 2021 registered with Dahisar 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 Dahisar police station on the first Monday of every alternate month in 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.)