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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO. 2509 OF 2023

Shamsheer Shammo Mohammed Kuni	...Applicant
Versus	
The State of Maharashtra	...Respondent

Mr. Kamlesh M. Satre with Mr. Vikas Chawan, for Applicant.

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

Mr. Jadhav, API, Nayanagar Police Station and Mr. Ashutosh
C. PSI, Waliv Police Station, Present.

CORAM:- N. J. JAMADAR, J.

DATED:- 1st FEBRUARY, 2024.

PC:-

1) Heard the learned Counsel for the applicant and the learned APP for the State.

2) The applicant, who is arraigned in connection with CR No. 317 of 2021 registered with Nayanagar police station, for the offences punishable under Sections 20, 22 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ("the Act, 1985") has preferred this application to enlarge him on bail.

3) On 15th May, 2021, pursuant to an intimation, Nayanagar police conducted surveillance near Geeta Nagar, Mira Road (E), Mumbai. Three persons came thereat on two Activa Scooters. Their movements appeared suspicious. Co-accused – Altamash Yusuf Shaikh – A1, Shoeb Noor Mohammad Kureshi- A2 and Altaf Yusuf Shaikh – A3 were accosted. They were apprised of their right under Section 50 of the NDPS Act, 1985. The accused No. 1 was found in possession of 50 Grams MD, the accused No. 2 was found in possession of 10 Grams MD and accused No. 3 was found in possession of 5 Grams Charas.

4) During the course of investigation, it transpired that the co-accused had procured the contraband articles from the applicant. On 20th May, 2021 a raid was conducted at Room No. 480, Second Floor, Sachinam Building Dharavi, Mumbai. The applicant was found in the said room. A pouch containing a white substance was found lying besides two mobile handsets. Upon being confronted the applicant disclosed that it was MD. It weighed 120 Grams. The contraband article was seized and samples were collected. After apprising the applicant of his right under Section 50 of the NDPS Act, 1985, the person of the applicant was searched. However, in the personal search no contraband article was found. The applicant came to be arrested.

5) The learned Counsel for the applicant submitted that the search and seizure are vitiated for non-compliance with the provisions contained in Sections 42 and 50 of the Act, 1985. In addition, there is a complete non-compliance of the mandate contained in Section 52A of the Act, 1985. It was submitted that it was not a case of a chance recovery. The empowered officer had already become aware of the applicant having been suspected to be in possession of the contraband articles, on 16th May, 2021 itself. However, the information was not recorded. Nor its copy was forwarded to the Superior Officer. Therefore, the search stands completely vitiated.

6) Secondly, the search and seizure was conducted after sunset and before sunrise, without complying with the provisions contained in Section 42 (2) of the NDPS Act, 1985. It was submitted that the search also stands vitiated as from the seizure of Panchanama, it becomes clear that the person of the applicant was searched by Police Constable – Chandan Shive and not by the empowered Officer. Lastly, the learned Counsel submitted that there is a complete non-compliance of the provisions contained in Section 52A of the Act. On this count alone, the trial would stand vitiated as there would be no primary evidence.

7) The learned APP resisted the prayer for bail. It was submitted that there was compliance with the provisions contained in Section 42 of the NDPS Act, 1985, as an entry was made in the station diary of Dharavi Police Station on 20th May, 2021. The learned APP further submitted that the rest of the grounds urged on behalf of the applicant can be legitimately considered at the stage of the trial. At this stage, according to the learned APP, the rigorous contained in Section 37 of the NDPS Act, come into play with full force and the twin test cannot be said to have been satisfied.

8) Evidently, the search was conducted between 9.30 pm to 10.35 pm. The provisions contained in Sub Section (1) of Section 42 of the NDPS Act, 1985 provide that for exercising powers enumerated under the said sub-Section at any time whether by day or night a warrant of arrest or search issued by a Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class who has been specially empowered by the State Government in that behalf or an authorisation under sub - Section (2) of Section 41 by an empowered officer is necessary. An empowered officer can exercise those powers, without such warrant or authorisation, only between sunrise and sunset. However, the proviso permits an empowered or

authorised officer to exercise the said power at any time between sunset and sunrise if he has reason to believe that such a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender and he records the grounds of his belief. In other words, search or seizure by an empowered officer between sunset and sunrise to be valid, must have contemporaneous record of the grounds of the belief of the empowered officer that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender.

9) In the case at hand, there is material to indicate that the empowered officer became aware of the complicity of the applicant on 16th May, 2021 itself. The house search of the applicant was conducted on 20th May, 2021 during sunset and sunrise. Yet, it does not appear that the grounds of his belief were recorded as mandated by the proviso to sub Section (1) of Section 42 of the NDPS Act, 1985. By no stretch of imagination, the search and seizure in the instant case can be said to be an instance of chance recovery.

10) Secondly, there is a complete non-compliance of the mandate contained in Section 52-A of the NDPS Act, 1985. It

does not appear that any effort was made to make an inventory of contraband articles and get the inventory certified by the Magistrate in terms of Section 52-A (2) of the NDPS Act, 1985 nor the representative samples of the contraband articles were drawn in the presence of the Magistrate and the correctness of the list of the samples so drawn was got certified.

11) The submission on behalf of the applicant that the person of the applicant was searched by an officer, who is not empowered by the State Government, also appears to carry some substance. The seizure panchanama indicates that the search of the applicant was conducted by the Police Constable – Chandan Shive. In terms of the Notification issued by the State Government in the exercise of the power of Sub Section (1) of Section 42 of the NDPS Act, 1985, inter alia, all police officers of and above the rank of Head Constable in the State of Maharashtra are empowered for the purposes of Sub Section (1) of Section 42 of the NDPS Act, 1985. It is a different matter that the in the personal search of the applicant no contraband article was found. Nonetheless, prima facie, it appears that the search of the applicant was carried out by the police personnel, who was not empowered by the State Government under Section 42 (1).

12) The cumulative effect of the aforesaid contraventions is that the search prima facie gets vitiated. Resultantly, the Court would be justified in drawing an inference that the accused may not be guilty of the offences for which he has been arraigned. There are no antecedents of the applicant. An inference may, therefore, be justified that if released on bail, the applicant may not indulge in an identical offences. The twin test envisaged by Section 37 of the NDPS Act, 1985 can thus be said to have been satisfied.

13) In any event, the applicant is in custody since 21st May, 2021. Having regard to the large pendency of cases, it is unlikely that the trial can be concluded within a reasonable period. An inordinately long period of incarceration as an under-trial prisoner infringes the right of speedy trial which is a facet of the fundamental right under Article 21 of the Constitution of India. It would be suffice to make a reference to a recent order of the Supreme Court in the case of **Rabi Prakash Vs. The State of Odisha in Special Leave to Appeal (Crl.) No. 4169 of 2023**. The Supreme Court observed as under:-

“ 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. Reliance is also placed on **Nitish Adhikary @ Bapan Vs. The State of West Bengal (Special Leave to Appeal (Crl.)**

No. 5769 of 2022), Gopal Krishna Patra @ Gopalrusma Vs. Union of India (Criminal Appeal No. 1169 of 2022) decided on 05/08/2022, and Sharifulislam @ Sarif Vs. The State of West Bengal (Special Leave to Appeal (Crl.) 4173 of 2022) decided on 04/08/2022. ”

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

15) Hence, the following order:

: O R D E R :

(i) The application stands allowed.

(ii) The applicant Shamsheer Shammo Mohammed Kuni be released on bail in CR No. 317 of 2021 registered with Nayanagar police station, for the offences punishable under Sections 20, 22 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985, on furnishing a P.R. Bond in the sum of Rs.1,00,000/- with one or two sureties in the like amount, to the satisfaction of the learned Sessions Judge.

(iii) The applicant shall mark his presence at the concerned Police Station on the first Monday of every month between 10.00 am to 12.00 noon for a period of two years or till conclusion of trial, whichever is earlier.

(iv) The applicant shall not tamper with the prosecution evidence and/or give threat or inducement to the first informant and any of the persons acquainted with the facts of the case.

(v) The applicant shall not indulge in the identical activity for which he has been arraigned in this case.

(vi) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of 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 observations made hereinabove.

[N. J. JAMADAR, J.]