

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 2533 OF 2023

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Umesh Purshottam Gaikwad ...Applicant
Versus
The State of Maharashtra ...Respondent

Mr. Taraq Sayed, a/w Mithilesh Mishra, i/b Agastya Desai,
for the Applicant.

Mr. S. R. Aagarkar, APP for the State/Respondent No.1.
API Rasam, a/w PSI Ambre, ATS Kalachowky, present.

CORAM: N. J. JAMADAR, J.

DATED: 30th APRIL, 2024

ORDER:-

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

2. The applicant, who is arraigned in NDPS Special Case No.1/2023, arising out of CR No.12 of 2022, registered with ATS Kalachowki Unit, Mumbai, for the offences punishable under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act, 1985"), has preferred this application to enlarge him on bail.

3. The gravamen of indictment against the applicant is as under:

On 5th July, 2022 while the ATS police were on patrolling duty in the Sharda Talkies lane, near Kohinoor Mill, Dadar (E), two persons were found moving suspiciously. They were accosted. The first person identified himself as Umesh Gaikwad, the applicant, and the second, Arif Shaikh (A2). The applicant and co-accused were apprised of their right to be searched before the nearest Magistrate or Gazetted Officer. They declined to avail the said right. In the search of the applicant in the presence of panch witnesses, in the bag, which the applicant was carrying, a square shaped packet wrapped with cello tape was found. Upon removal of wrapper a sticky blackish substance was found kept in a transparent plastic bag. A part of the said substance was scraped out and tested with the drug detection kit. The test turned out positive for *charas*. It weighed 1,800 grams. The contraband article was seized and labeled 'A1'. In the search of Arif Shaikh (A2) 50 grams *charas* was found. The contraband article found in possession of accused No.2 was also seized.

4. Mr. Sayed, the learned Counsel for the applicant, submitted that the search and seizure is completely vitiated on account of non-compliance of the mandate contained in Section 50 of the NDPS Act, 1985. It was submitted that it

was a case of joint appraisal in breach of the mandate contained in Section 50 of the NDPS Act, 1985. The applicant was not apprised of his “right” to be searched in the presence of Magistrate or Gazetted Officer. The appraisal was thus infirm. To bolster up this submission reliance was placed on the decision of the Supreme Court in the case of *State of Rajasthan vs. Parmanand and another*¹ and an order passed by this Court in the case of *Mohsin Mohammed Khan vs. The State of Maharashtra*². Reliance was also placed on an order passed by this Court in the cases of *Nadeem Abdul Rahim Choughule vs. The State of Maharashtra*³. Secondly, the inventory before the learned Magistrate was conducted on 10th August, 2022. There was an inordinate delay in conducting the inventory.

5. In view of the aforesaid infirmities, according to Mr. Sayed, the applicant can be said to have succeeded in demonstrating that the interdict contained in Section 37 of the NDPS Act, 1985 may not be attracted. Therefore, the applicant deserves to be enlarged on bail.

1 2014 DGLS (SC) 213.

2 BA/1496/2018, dtd.6/8/2018.

3 BA/1801/2021, dtd.14/9/2022.

6. Mr. Agarkar, the learned APP, stoutly resisted the prayer for bail. It was submitted that there was scrupulous compliance of the provisions contained in Section 50 of the NDPS Act. Moreover, the contraband was found in the bag which the applicant was carrying and not on the person of the applicant. Therefore the provisions contained in Section 50 of the NDPS Act, 1985 are not at all attracted. It was submitted that the investigating agency carried out the inventory in conformity with the provisions contained in Section 52A of the NDPS Act, 1985.

7. The ground of non-compliance of the mandate contained in Section 50 of the NDPS Act was premised on the improper appraisal of the said right. The appraisal memo indicates that the applicant was informed that having regard to the provisions contained in Section 50 of the NDPS Act, 1985 the applicant could insist for his search before a Magistrate and Gazetted Officer. Mr. Sayed would urge that in the appraisal memo the word that the applicant has a legal right to be searched before the nearest Magistrate or Gazetted Officer is conspicuous by its absence and, therefore, the appraisal was infirm.

8. In the case of *Parmanand* (supra) it was enunciated that a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the purpose of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. The accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before the nearest Gazetted Officer or Magistrate.

9. There can be no quarrel with the aforesaid proposition. However, in the facts of the case, I am not persuaded to agree with the submissions of Mr. Sayed that there was a joint communication. It is true, in the panchnama it is recorded that the authorized officer apprised the applicant and the co-accused about their right to be searched in the presence of nearest Magistrate or Gazetted Officer. However, it is imperative to note that the panchnama also records that a

notice under Section 50 of the NDPS Act was served on the applicant and co-accused and they declined to avail the said right. The appraisal memo (page 95) indicates that the applicant was individually apprised of the said right.

10. It is true the appraisal memo records that the applicant could insist for his search before the nearest Magistrate or Gazetted Officer and it is not, in terms, recorded that the applicant has such a right. In the facts of the case, in my considered view, it is not necessary to delve deep into semantics. The reason is not far to seek.

11. It is well recognized that the provisions contained in Section 50 of the NDPS Act are attracted when the person of the suspect is searched and not the bag or other article carried by the suspect. In the case at hand, there is material to indicate that the police party had seen the applicant carrying a sack bag and in the search of the sack bag the contraband substance was found. Therefore, the provisions contained in Section 50 of the NDPS Act are not *prima facie* attracted.

12. Reliance placed on the decision in the case of ***Pramanand*** (supra) to the extent it holds that where the bag carried by the suspect is searched and his person is also

searched, the provisions contained in Section 50 of the Act will have application, does not appear well-founded as the position was clarified by a Three-Judge bench of the Supreme Court in the case of *State of Punjab vs. Baljinder Singh and another*⁴, wherein it was enunciated as under:

“17. In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of contraband pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act as far as “personal search” was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion (3) as aforesaid.”

13. In view of the aforesaid exposition of law, in the facts of the case, the ground of non-compliance of the mandate contained in Section 50 of the NDPS Act, 1985 *prima facie* does not merit countenance.

14. Evidently, the entire contraband found in possession of the applicant was seized and sealed at the time of search and labeled as ‘A1’. The Investigating Officer did not collect the samples at the time of seizure. Inventory was conducted before the jurisdictional Magistrate on 10th August, 2022. The samples were drawn in the presence of the learned Magistrate. The said fact becomes evident from the order

⁴ (2019) 10 Supreme Court Cases 473.

passed by the learned Magistrate (page 65) and the certificate appended below the inventory panchnama (page 64). It is true, the inventory was carried out on 10th August, 2023. However it does not appear that there was such inordinate delay in carrying out the inventory as to vitiate the process of inventory under Section 52A of the NDPS Act, 1985.

15. In the aforesaid view of the matter, I do not find any substantial probable cause to justify an inference that the applicant may not be guilty of the offences for which he has been arraigned. The interdict contained in Section 37 of the NDPS Act applies with full force and vigor. The applicant, therefore, cannot be enlarged on bail.

16. Hence the following order:

: O R D E R :

- (i) Application stands rejected.
- (ii) 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.

[N. J. JAMADAR, J.]