

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2511 OF 2023

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Jafar Asif Sayyad

...Applicant

vs.

The State of Maharashtra

...Respondent

Mr. Ajay Bhise a/w. Ms. Tarsem Gabbi, for the Applicant.

Mr. S.R. Agarkar, APP for the State- Respondent No.1.

CORAM	:	N. J. JAMADAR, J.
RESERVED ON	:	MARCH 05, 2024
PRONOUNCED ON	:	MARCH 12, 2024

JUDGMENT

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

2. The applicant, who is arraigned in C.R. No. 497 of 2022 registered with Naya Nagar police station for the offences punishable under Section 20 (c) and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, 1985), has preferred this application to enlarge him on bail.

3. On 9th July, 2022 at about 22.30 hours while the police team of Anti Narcotic Cell were patrolling near Shanti Nagar, Sector No. 11, Mira Road (E), a person was found moving suspiciously. He was accosted. After apprising the said person of his right to be searched before a gazetted officer/ Magistrate, his person was searched. A

plastic pouch having chip lock containing white and off white substance was found in his possession. It was Mephedrone (MD). It weighed 8 gms. The said person identified himself as Aafaq Sayyed (accused No. 1). Upon inquiry, Aafaq Sayyed (accused No. 1) disclosed that he had obtained the said contraband substance from his step brother Jafar Sayyed, the applicant/accused No. 2 for further sale.

4. The police party conducted a raid at the house of the applicant at Room No. 502, Sundaran Building, Evershine Complex, Naya Nagar, Mira Road (E), Thane. In one of the bedrooms, there was a table. In the drawer of the said table, a box containing a plastic pouch with chip lock which contained a white and off white substance having pungent smell was found. Small spoons and three bundles of small plastic pouches with chip lock were also found in the said drawer. The contraband substance weighing 101 gms, two small electric scales, cello tape cutter and bundle of rubbers were also found. All the contraband and incriminating articles were seized. Samples were collected. The applicable came to be arrested.

5. Mr. Bhise, the learned counsel for the applicant submitted that the applicant came to be arrested only on the basis of

statement of the co-accused, in whose possession a small quantity of MD was found. Mr. Bhise submitted that even if the prosecution case is taken at par, there is a serious lacuna in the prosecution case as there is a non-compliance of the provisions contained in section 52-A, in letter and spirit. Inviting attention of the Court to the seizure panchanama, Mr. Bhise submitted that the authorized officer had allegedly collected the samples at the time of the very seizure and marked them as Exhibit -B1 and B2, and the bulk was marked Exhibit- B. On the very next day i.e. 11th July, 2022 the sample, Exhibit- B1 allegedly collected from the bulk recovered from the applicant was forwarded to FSL. Thereafter, on 13th July, 2022, the inventory seems to have been conducted before the learned Magistrate under section 52-A of the NDPS Act, 1985.

6. Laying emphasis on the fact that the inventory was in respect of the bulk (Exhibit-B) and reserved sample (Exhibit B2), the learned counsel would submit that the prosecution case would thus rest on the C.A. report (page 541) dated 26th April, 2023 which indicate that the C.A. received two samples (A1) and (B1) and MD was detected in those samples. Since, the samples were not collected in the presence of learned Magistrate and forwarded to C.A. for analysis, there is a absolute non-compliance of the mandate

contained in section 52-A of the NDPS Act, 1985. Thus, it can not be said that there is primary evidence and therefore the applicant deserves to be enlarged on bail.

7. As against this Mr. Agarkar, learned App resisted the prayer for bail. It was submitted that the provisions contained in section 52-A can be said to have been duly complied as within a couple days of recovery, the inventory was conducted before the Magistrate, as is evident from the inventory panchanama dated 13th July, 2022 (page 106). Therefore, it cannot be urged that there is a non-compliance of the provision contained in section 52-A of the Act. Mr. Agarkar, further submitted that the applicant had antecedents which also dis-entitle the applicant from the exercise of discretion.

8. Mr. Bhise, the learned counsel for the applicable joined the issue by canvassing a submission that though the applicant has antecedents, yet in view of the fact that the prosecution case suffers from a serious defect as the samples were collected at the time of seizure and not before the Magistrate, the alleged antecedents of the applicant do not constitute an impediment. Reliance was sought to be placed on the order dated 21st September, 2021 in **Criminal Application (BA) No. 778 of 2021 in the case of Pavan Nandkishor**

Sedani vs. State wherein it was enunciated that the past antecedents of accused may be extremely relevant where the prosecution makes out a reasonably strong prima facie case on the basis of material collected during the course of investigation. However, bail cannot be denied on the ground that there are prosecutions already registered against the accused, if the material on record in the subject crime, is not sufficient in the view of the Court to establish a reasonable prima facie case.

9. Evidently, there does not seem to be much controversy on facts. During patrolling duty on 9th July, 2022 Aafaq Sayyed (accused No. 1) was found in possession of the small quantity of MD. Accused No. 1 allegedly claimed to have obtained the said contraband article from the applicant. In the house search of the applicant, 109 gms. MD was allegedly recovered. The seizure panchanama records that the authorized officer had collected two samples of the contraband weighing 5 gms each in the pouches having chip lock. Those samples were marked Exhibit-B1 and B2 and the bulk was marked Exhibit- B. It appears that the samples so collected were forwarded to C.A. on the very next day i.e. 11th July, 2022 under the cover of the letter (Exhibit 248). The C.A report (page 541) seems to have been issued on analysis of two samples

labelled (A1), recovered from co-accused No. 1, and (B1), allegedly recovered from the applicant. It further appears that the inventory as envisaged by section 52-A of the NDPS Act, 1985 was conducted on 13th July, 2022. From the perusal of the inventory panchanama, it becomes abundantly clear that only the bulk (Exhibit- B) and reserve sample (Exhibit B2) were produced before the Magistrate.

10. The situation which thus obtains is that though the inventory was conducted before the Magistrate yet, the samples which was sent for analysis were collected at the time of seizure itself and it is on the basis of those samples, the C.A has issued the reports of analysis. The case is not one of a complete non-compliance of section 52-A of the NDPS Act, 1985.

11. 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

1 (2016) 3 Supreme Court Cases 379.

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 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.

12. 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.

13. The aforesaid pronouncement, in the case of **Mohanlal** (supra) has been followed in recent pronouncements in 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. In the case of **Yusuf** (supra) after referring to decision of the Supreme Court in the case of **Mohanlal** (supra), Supreme Court observed as under :-

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.

14. In the case of **Simaranjit Singh** (supra) after extracting the

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.

observations of the Supreme Court in paragraphs 15 to 17 in the case of **Mohanlal** (supra), the Supreme Court reiterated that the act of an authorized officer of drawing samples from all the packets seized is not in conformity with the law laid down by the Supreme court in the case of **Mohanlal** (supra). That creates a serious doubt about the prosecution case that substance recovered was a contraband.

15. In the case of **Mohammed Khalid** (supra) the Supreme Court ruled in no uncertain terms that where the proceeding under section 52-A of the NDPS Act, 1985 were not undertaken by the investigating officer for preparing an inventory and obtaining samples in the presence of the jurisdictional Magistrate, the FSL report was nothing but a waste paper and cannot be read in evidence.

16. At this stage, it is necessary to make a reference to a decision of learned single Judge of this Court in the case of **Mukesh Rajaram Chaudhari vs. State of Maharashtra**⁵ wherein after an elaborate analysis of the provisions contained in the NDPS Act, 1985 and the judgment of the Supreme Court in the case of **Mohanlal** (supra) and **Simaranjit Singh** (supra), the learned single Judge posed a question

5 BA. No.54 of 2023, Dt. 27/09/2023

whether those judgments completely take away the discretion of the court while considering the question of grant or refusal of bail to an accused under the NDPS Act and the rigors of Section 37 of the NDPS Act be lifted. The learned single Judge answered the question as under:-

18] At this stage, it is necessary to make a reference to another decision of the learned Single Judge of this Court (M.S.Karnik, J.) in the case of Mukesh Rajaram Chaudhari V/s. The State of Maharashtra⁶ wherein after an elaborate analysis of the provisions contained in the Act, 1985 and the judgments of the Supreme Court in the cases of Union of India V/s. Mohanlal (supra) and Simaranjit Singh V/s. State of Punjab⁷ the learned Single Judge posed a question, whether those judgments completely take away the discretion of the Court while considering the grant or refusal of the bail to an accused under the NDPS Act and the rigours of Section 37 of the Act stand lifted ?

The learned Single Judge answered the question as under :

“37. It is undoubtedly true that when the investigating agency has not followed the procedure under Section 52A of the NDPS Act, the deeming fiction of photographs, samples etc., being treated as primary evidence as provided under Sub-section (4) of Section 52A would not be available. However, the question is, is this the only mode in which the prosecution can establish the charge against the accused? In this context, two scenarios are likely to arise. In both cases, let us assume that the prosecution has not followed the provisions of Section 52A and taken aid of the Magistrate in drawing the samples and sending for forensic analysis. In the first scenario, if the seized substance is still not destroyed and is available in the custody of the investigating agency, there is nothing to stop the said agency from following the full gamut of the procedure provided under Section 52A before destroying or disposing off the goods and then relying on the deeming fiction contained in Sub-section (4) of Section 52A of the NDPS Act. The only question in such a scenario would be why were such steps taken at a belated stage. Second scenario would be that the samples have been drawn, not in the presence of Magistrate and the

6 BA No.54 of 2023 dt. 27 Sept. 2023

7 2023 SCC Online SC 906

goods have been destroyed with the permission of the Magistrate. In such a situation also, all that can happen is with the prosecution cannot avail of the deeming fiction provided in Sub-section (4) of Section 52A of the NDPS Act. This, however, does not mean that the prosecution cannot establish the charges against the accused through the means of other evidence available with it. For example, if the process of taking samples may not be in the presence of the Magistrate, but is shown to be properly followed with the aid of the support of the panch witnesses which the court finds believable and reliable, I do not see how the prosecution case would be destroyed totally. In either of the scenarios noted above, it would be eventually a question of what evidence is brought on record and how such evidence is to be evaluated. Both the aspects are in relation to conduct of trial. At the stage when the court is concerned with the question of granting or refusing bail, this cannot be the sole consideration. It may be one of the relevant considerations but cannot be the sole consideration on the basis of which the moment it is shown that the procedure under Section 52A of the NDPS Act is not followed, the accused automatically becomes entitled to bail as a matter of right. The rigors of Section 37 of the NDPS Act would continue to apply. Only when the bail court is satisfied that reasonable grounds of believing that the accused is not guilty of the offence and that he is not likely to commit any offence while on bail, the bail would be granted. I, therefore, do not find any merit in the submission of learned counsel for the applicant that in the present case non-compliance of Section 52A would entitle the applicant to bail.”

17. In the case of **Alpesh Kumar Suresh Kumar Jain vs. The State of Maharashtra**⁸ I had an occasion to consider the aspect of non-compliance of section 52-A and after referring to the aforesaid decision in the case of **Mukesh Chaudhari** (supra), it was observed as under:-

20] The approach adopted by this Court in the case of **Mukesh Rajaram Chaudhari (supra)**, cannot be said to be unsustainable. The endeavour of the Court was to balance the object with which the interdict contained in Section 37 of the Act, 1985 has been enacted with the imperativeness of following the mandatory provisions of the Act, 1985 which provide in built safeguard against the possibility of planting or false implication. The insistence on scrupulous compliance of the provisions which incorporate the safeguards, is

8 BA. No. 1485/2023, Dt. 31/01/2024.

premised on the stringent punishment which the offences entail and also a statutory bar in the matter of releasing the accused on bail.

21] A case of complete non-compliance of Section 52-A and the one with material to indicate that there was a substantial compliance or there was still possibility of compliance of Section 52-A of the Act, in my view, stand on different footings.

18. Re-adverting to the facts of the case, it is necessary to note that it cannot be urged that there is a complete non-compliance of the provisions contained in section 52-A of the NDPS Act, 1985. The question of weight to be given to the inventory before the Magistrate, after a couple of days of the alleged seizure, would be a matter for adjudication at the trial. The bulk (B) and the reserve sample (B2) which were produced before the Magistrate and duly certified by the Magistrate, may still constitute primary evidence. In a situation of this nature, where the inventory has been conducted after a couple of days of seizure, whether the trial would stand vitiated can only be considered at the stage of trial.

19. On the aspect of antecedents of the applicant, it appears that the applicant was arraigned in C.R. No. 466 of 2021 for the offence punishable under sections 8(c), 22(b) and 29 of the NDPS Act, 1985, after the applicant was arraigned in the instant crime. I have perused the copy of the FIR in C.R. No. 466 of 2021.

20. In the said case 9.2 gm, MD was found in possession of the co-accused Kamlesh Khanna. The said co-accused had stated that the said contraband article was allegedly delivered to him by the applicant through another co-accused Salman.

21. In view of the aforesaid antecedents of the applicant, the Court will not have assurance that the applicant will not indulge in an identical offence, if released on bail. Thus, the twin test envisaged by section 37(1)(b)(ii) cannot be said to have been satisfied. Resultantly, I am not inclined to release the applicant on bail.

Hence, the following order.

ORDER

1] The application stands rejected.

2] 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.)