



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.2603 OF 2023**

Jahid Mohd. Hanif Shaikh
versus
State of Maharashtra

... Applicant
... Respondent

Mr. Mandar Goswami, for Applicant.

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

Mr. Sunil Jadhav and Mr. Rajkumar Pawar, API, Padgha Police Station, Thane Rural,
present.

CORAM: N.J.JAMADAR, J.

DATE : 24 JANUARY 2024

P.C.

1. Heard the learned Counsel for the parties.
2. The applicant who is arraigned in Special Case No.235 of 2021 arising out of C.R.No.354 of 2020 registered with Padgha Police Station for the offences punishable under Sections 20(b)(ii)(C) read with 8(c) and Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has preferred this application to enlarge him on bail.
3. On 21 December 2020 at about 9.00 p.m., Padgha Police were on patrol duty. When the police party reached near Savadh Square on the road leading to Pisa dam, two persons were found sitting in a car in suspicious circumstances. The applicant and the co-accused Ishwar R. Mishra were accosted. As the movements of the applicant appeared to be suspicious and they gave evasive answers, search was

conducted. In the search of Innova Car bearing No.MH-02/AL-846, a plastic container and a plastic bag were found concealed in the dicky. It transpired that the plastic container contained a grey light colour substance. It appeared to be brown sugar. In the plastic bag, white substance was found and it appeared to be mephedrone. The personal search of the applicant and the co-accused was also taken. A small weighing scale and small plastic bag were also found concealed in the seat cover of the driver's seat. The contraband articles were weighed and samples were collected. One kilo 70 gms of brown sugar and one kilo 700 gms of mephedrone were, thus, found in possession of the applicant and the co-accused. Investigation revealed that the applicant and the co-accused were procuring the contraband articles from co-accused Farida Nasim Shaikh and two wanted accused Barkat Yusuf Pathan and Kamil Ajaj Hujuru @ Koma, and were selling the contraband articles.

4. Learned Counsel for the applicant submitted that the search and seizure is vitiated on account of non-compliance of the mandatory provisions contained in Section 50 of the Act, 1985. The prosecution has relied upon the joint appraisal of the right to be searched in the presence of a Gazetted Officer or Magistrate. Such joint appraisal is not legally sustainable. Secondly, there is a complete non-compliance of the mandate contained in Section 52A of the Act, as the samples were allegedly collected at the time of seizure itself and no inventory had been prepared before the Magistrate. Learned Counsel would urge that the search is also vitiated as it was

conducted by a private person and not the authorized officer.

5. Learned Counsel for the applicant further submitted that the applicant has been in custody since December 2020 and there is no prospect of expeditious conclusion of the trial and on the ground of long incarceration without trial also, the applicant deserves to be released on bail.

6. Learned APP submitted that the question as to whether there is non-compliance of the mandatory provisions contained in Section 42 and 50 of the Act, can be legitimately considered at the stage of trial. Moreover, since the seizure of contraband articles, in the case at hand, was a case of chance recovery during the course of patrol duty, Section 50 of the Act does not come into play. In any event, according to the learned APP, the police had searched the car in which the applicant was sitting and it was not a case of search of person and, therefore, search and seizure cannot be said to have been vitiated for non-compliance of the provisions contained in Section 50 of the Act.

7. Learned APP, however, fairly submitted that there is no material to show that the investigating agency had complied with the provisions contained in Section 52A of the Act.

8. Before adverting to consider the non-compliance of the mandate contained in Section 52A of the Act, it may be expedient to note the ground of non-compliance of Section 50 and the search and seizure by an unauthorized person.

9. Section 50 casts an obligation on the authorized officer who is about to search any person to take such person, if such person so requires, without unnecessary delay to the nearest Gazetted Officer or the Magistrate. To give meaning and content to this right, the law insists that such person should be apprised of his right to be searched in the presence of a Gazetted Officer or a Magistrate.

10. In the case of **State of Punjab V/s. Baldev Singh**¹ the Constitution Bench held that :

“(1) that when an empowered officer or a duly authorized officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(3) that a search made by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.”

11. As is evident, the requirement of search would come into play where the ‘person’ is to be searched, meaning thereby a human being with appropriate covering,

1 (1999) 6 SCC 172

clothing and footwear. A bag or other container carried by a person or the vehicle in or by which the person is travelling, cannot be treated as body of human being and, therefore, the rigours of Section 50 is not attracted.

12. In the case at hand, the contraband articles were allegedly found in the dicky of the car in which the applicant was allegedly sitting. It is in this context, learned APP made an endeavour to urge that the mandate of Section 50 is not attracted in the facts of this case.

13. I am afraid to accede to this submission. From the perusal of the FIR, it becomes evident that the raiding party professed to carry out search of the car as well as the applicant and the co-accused and requested the panch witnesses to evidence the search. When the container and/or vehicle is searched along with the person, compliance of Section 50 of the Act is necessary. In such a situation, merely because no contraband article was found on the 'person' of the accused and the contraband article was found in the container and/or vehicle does not imply that Section 50 of the Act need not be complied with.

14. In the case of **Dilip and Anr. V/s. State of M.P.**² the Supreme Court enunciated that in the said case, the provisions of Section 50 might not have been required to be complied with so far as the search of scooter was concerned, but keeping in view the fact that the person of the appellants was also searched, it was

² (2007) 1 SCC 450

obligatory on the part of the officer to comply with the said provisions.

15. Following the aforesaid judgment in the case of **State of Rajasthan V/s. Parmanand and Anr.**³ where the opium was recovered from the bag carried by the Respondent No.1, it was enunciated as under :

“15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act, will have application. In this case, Respondent No.1 Parmanand’s bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of Respondent No.2 Surajmal was also conducted. Therefore, in the light of the judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.” (emphasis supplied)

16. Interestingly, the investigating agency has professed to demonstrate that the applicant and co-accused were apprised of their right to be searched before the Gazetted Officer or the Magistrate, by pressing into service an appraisal memo (page 47). It indicates that a joint appraisal was made to the applicant and co-accused Ishwar. Purportedly the applicant and Ishwar have both signed the said appraisal memo.

17. The aforesaid decision of the Supreme Court in the case of **State of Rajasthan (supra)**, is also an authority for the proposition that the joint appraisal is not in consonance with the mandate of Section 50 of the Act. Paragraph No.17 reads

3 (2014) 5 SCC 345

as under :

“17. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. 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. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh⁴ and the Bombay High Court in Dharamveer Lekhram Sharma⁵ meets with our approval.”
(emphasis supplied)

18. Prima facie, there is a breach of the mandate contained in Section 50 of the Act, as in the FIR as well as seizure panchanama, there is no reference to the fact that the applicant and the co-accused were apprised of their right under Section 50 of the Act, though their ‘person’ was searched. Even otherwise, the desperate endeavour to show the compliance of Section 50 by pressing into service joint

4 (1997) 1 Crimes 242

5 (2001) 1 Crimes 586

appraisal memo, prima facie, does not merit acceptance.

19. On the aspect of search by an unauthorized person, learned Counsel for the applicant invited attention of the Court to the statement of Mohammad Ishaq Ibrahim, a person who had weighed the contraband and collected the samples from the seized containers at the instance of the police. In my view, that would be a matter for adjudication at the trial.

20. Lastly, it is not the prosecution's case that there has been compliance with the provisions contained in Section 52A of the Act. The said provision does not seem to have been complied with either immediately after the seizure or at any point of time thereafter.

21. The learned Counsel was justified in placing reliance on the decision of the Supreme Court in the case of Yusuf @ Asif V/s. State⁶ wherein in the backdrop of the submission that seizure and sampling of the alleged contraband article was in violation of the mandatory provisions contained in Section 52A(2) of the Act, 1985, the Supreme Court after examining the provisions contained in Section 52A of the Act and the decision of the Supreme Court in the case of Union of India V/s. Mohanlal and Anr.⁷ observed, inter alia, as under :

“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

⁶ Criminal Appeal No.3191 of 2023 arising out of SLP(Cri.) No.3010 of 2023)

⁷ (2016) 3 SCC 379

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.” (emphasis supplied)

22. Prima facie, there is a non-compliance of Section 50 and 52A of the Act.

In the circumstances, where for want of primary evidence, the trial may stand vitiated and, even if it is assumed that the trial may not be vitiated, yet on account of the search in violation of the provisions of Section 50 of the Act, eventually the conviction would stand vitiated, the Court would be justified in drawing an inference that there are grounds to believe that the applicant is not guilty of the offences.

23. On the aspect of the antecedents of the applicant, undoubtedly, there are number of crimes registered against the applicant for the offences punishable under the Indian Penal Code. However, it does not appear that the applicant has been arraigned, in the past, for the offences committed under the NDPS Act. It may, therefore, be justifiable to infer that it is unlikely that the applicant may indulge in the identical offences, if released on bail. Resultantly, the twin conditions can be said to have been prima facie made out.

24. Even otherwise, the applicant is in custody since December 2020. It is unlikely that the trial can be concluded within a reasonable period. Long period of incarceration also deserves to be appropriately taken into account.

25. Hence, the following order :

ORDER

- (i) The Application stands allowed.
- (ii) The Applicant – Jahid Mohd. Hanif Shaikh be released on bail in C.R.No.354 of 2021 registered with Padgha Police station 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 Padgha Police Station on first Monday of every month in between 11 am to 1 pm for a period of two 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

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.)