

Shailaja

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

CRIMINAL BAIL APPLICATION NO.1914 OF 2022

Yogesh Shashikant Mahajan	]	Applicant
Vs.		
The State of Maharashtra	]	Respondent

a/w

CRIMINAL BAIL APPLICATION NO.2955 OF 2022

Pravin Balasaheb Wayse	]	Applicant
Vs.		
State of Maharashtra	]	Respondent

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Mr. Nitin Gaware-Patil a/w Mr. Siddharth Agarwal and Mr. Narayan Rokade, for Applicant in Criminal Bail Application No.1914 of 2022.

Ms. Alpa T. Javeri, for Applicant in Criminal Bail Application No.2955 of 2022.

Mr. A.A. Palkar, A.P.P, for Respondent – State in both the Criminal Bail Applications.

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CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 15th MARCH, 2024.
PRONOUNCED ON : 18th MARCH, 2024.

COMMON ORDER:

1. The applicants are being prosecuted by Lonikand Police Station, Pune in connection with C.R. No.462 of 2021 for the offences punishable under Sections 8 (c), 20 (b) (ii) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “N.D.P.S Act”).
2. Prosecution case, in brief, is as follows.
3. On 11th September, 2021, Police Naik Chetan Gaikwad attached to Anti Narcotics Cell Crime Branch, *Pune* along with other staff was on patrolling duty in an official vehicle bearing No. MH-20-AS-2057. Before proceeding for patrolling duty, a station diary entry bearing No.25 of 2021 was made.
4. When they were near hotel Blue Nile, secret information was received from an informant that a white coloured Tata Ultra 1014 Truck on *Lohgaon Wagholi* Road is being used for transporting some narcotic substance. Patrolling team, therefore, rushed towards Lohgaon Wagholi road. Police Inspector – Prakash Khandekar, who

was a member of the team asked the Driver to park the vehicle by the side of the road and were waiting for the aforesaid white coloured Tata Ultra vehicle. Around 10.40 a.m, they noticed the aforesaid Tata Ultra Vehicle proceeding from the road. Since the members of the team suspected movements of the Driver of the said vehicle, it was intercepted and stopped. When they inquired with the Driver, he gave evasive answers. When the staff checked the rear portion of the said vehicle, they noticed three white gunny bags and a person sitting near it. Since the members of the raiding team suspected that the bags might be containing some contraband, they informed the Driver and the said person by disclosing their identity. Upon being asked, those persons informed their names as “Pravin Balasaheb Wayse and “Yogesh Shashikant Mahajan” and occupation as “Driver”. Both were speaking in Marathi.

5. Police Inspector - Prakash Khandekar called passers by viz: Shankar Dattatray Shinde and Akshay Suhas Palande to act as *panch* witnesses by informing them about the details. Both of them agreed. The raiding team possessed all the material required for taking samples, sealing and weighing the same. The raiding team thereafter opened the nylon bags which were tied by means of strings. There

was a strong smell of *Ganja*. Those persons were informed about their right to be searched in view of Section 50 (1) of the N.D.PS Act before any Gazetted Officer or Magistrate. Upon refusal by these persons to be searched before a Gazetted Officer or Magistrate the Police Inspector found 71 kg 755 grams of Ganja with flowering of fruiting tops in the nylon gunny bags.

6. 25 grams of samples each were taken from all the three nylon bags and were sealed in six different brown coloured envelopes. They were numbered as “S-1”, “D-1”, “S-2”, “D-2”, “S-3” and “D-3”. The Tata Ultra vehicle was also seized in the presence of *pancha* witnesses. An offence came to be registered against those persons.

7. I heard Mr. Nitin Gaware Patil for applicant in Criminal Bail Application No.1914 of 2022, Ms. Alpa T. Javeri, for applicant in Criminal Bail Application No.2955 of 2022 and Mr. Palkar, learned A.P.P, for respondent – State.

8. At the outset, learned Counsel for the applicants strenuously urged to grant bail to the applicants for non compliance of Section 52-A of the N.D.PS Act The Counsel would invite my attention to

the record to indicate that even there is no certificate of correctness of the inventory by the Magistrate as required under Section 52-A (c) of the N.D.P.S Act.

9. Both the Counsel have placed reliance on the following judgments;

- (a) Union of India Vs. Mohanlal and another, ¹
- (b) Simarnjit Singh Vs. State of Punjab²
- (c) Yusuf @ Asif Vs. State³ and
- (d) Mohammed Khalid and another Vs. The State of Maharashtra⁴

10. Per contra, learned A.P.P, Mr. Palkar contended that in view of the amendment of the N.D.P.S Act r/w Section 76 as well as in view of General Clauses Act, Section 20, there is no need to send the samples immediately to the Magistrate for preparing inventory. Mr. Palkar tried to distinguish ratio of the judgment in the case of **Union of India Vs. Mohanlal and another** (supra) which according to him only considers disposal of the drugs after receipt of the report from

1 (2016) 3 Supreme Court Cases 379

2 2023 SCC Online SC 906

3 AIR 2023 Supreme Court 5041

4 Criminal Appeal No. (S) 1610 of 2023 with Criminal Appeal No.1611 of 2023

the Forensic Science Laboratory and not at the time of first seizure immediately after the raid. He stressed on the fact that subsequent observations in case of **Simarnjit Singh Vs. State of Punjab (supra)** and **Mohammed Khalid and another Vs. State of Maharashtra (supra)** would not be applicable in the present set of facts.

11. The complaint dated 11th September, 2021 by Police Naik Chetan Gaikwad who was also a part of the raiding team does not reveal that the seized contraband was taken before the Magistrate for getting certified after a seizure in view of Section 52-A, sub-section 2 (a), (b) and (c) of the N.D.PS Act. There is no whisper whether representative samples of the contraband were taken in the presence of the Magistrate in order to certify the correctness of the list of samples so drawn. Interestingly, the notices alleged to have been given to the applicants under Section 50 of the N.D.PS Act do not bear any date and time as to when the said notices were served upon them. The seizure *panchanama* which was drawn as per Section 43 of the N.D.PS act, since it was a chance raid of a vehicle in transit, does not reveal even compliance of Section 52-A of the N.D.PS Act.

12. At this stage, it would be apposite to draw support from the observations made by the Supreme Court in case of **Union of India Vs. Mohanlal and another** (supra). Relevant paras are extracted below;

“15. It is manifest from Section 52-A (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 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-sections (2) and (3) of Section 52-A above constitute primary evidence for 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 in case of **Simarnjit Singh Vs. State of Punjab** (supra), reiterated the ratio laid down by it in case of **Union of India Vs. Mohanlal and another** (supra) by observing that P.W.7 in that case while drawing samples from all the packets at the time of seizure had not followed the law laid down by the Supreme Court in the case of **Mohanlal**. The Supreme Court, therefore, observed that there is a serious doubt as regards substance recovered was, in fact, a contraband and, therefore, quashed the conviction and sentence of the appellant - Simarnjit Singh by acquitting him of the charges.

14. Similar view has been taken by the Supreme Court in the judgment in case of **Yusuf @ Asif Vs. State** (supra). Paragraphs 15 and 16 of the said judgment read 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”.

15. In a latest judgment of the Supreme Court in case **Mohammed Khalid and another** (supra), while hearing an appeal against concurrent judgments of the trial Court as well as the High Court of *Telangana*, it has been held by the Supreme Court thus;

“22. Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the Jurisdictional Magistrate. In this view of the matter, the FSL report (Exhibit P-11) is nothing but a waste paper and cannot be read in evidence. The accused A-3 and A-4 were not arrested at the spot. The offence under Section 20 (b) (ii) (c) deals with production, manufacture, possession, sale, purchase, transport, import or export of cannabis. It is not the case of the prosecution that the accused A-3 and A-4 were found in possession of *ganja*. The highest case of the prosecution which too is not substantiated by any admissible or tangible evidence is that these two accused had conspired sale/purchase of *ganja* with A-1 and A-2. The entire case of the prosecution as against these two accused is based on the interrogation notes of A-1 and A-2”.

It is observed by the Supreme Court that in the absence of due procedure contemplated in Section 52 - A of the NDPS Act by the Investigating Officer for preparing an inventory and obtaining

samples in the presence of the jurisdictional Magistrate, the Forensic Science Laboratory report is nothing but a waste paper and cannot be read in evidence. The conviction and sentence of the appellant has been set aside and he came to be acquitted by the Supreme Court of all the charges.

16. The applicants are in custody for a considerable period ever since their arrest on 11th September, 2021. There is no likelihood of conclusion of the trial within a reasonable period.

17. Even though, the learned A.PP has opposed the prayer for bail, the applicants are entitled to be released despite rigours of section 37 of the N.D.PS Act. There are reasonable grounds for believing that the applicants are not guilty of the offences with which they have been charged as is evident from the discussion made hereinbefore. As regards likelihood of committing similar offence in case of their release, stringent conditions can be imposed to ensure non interference with the evidence of the prosecution as well as chances of their abscondence.

18. Consequently, following order is expedient.

: ORDER :

- (a) The applications are allowed.
- (b) The applicants – Yogesh Shashikant Mahajan and Pravin Balasaheb Wayse be released on bail on executing a P.R bond in the sum of Rs.30,000/- each, with one or two sureties in the like amount to the satisfaction of the Additional Sessions Judge, Pune in Special Case No.175 of 2022 for the offences punishable under Sections 8 (c), 20 (b) (ii) and 29 of the N.D.P.S Act.
- (c) The applicants shall report the Office of the concerned Police Station on first Saturday of every month between 10.00 a.m and 1.00 p.m till the charge is framed;
- (d) After framing the charge, the applicants shall attend each date in the trial Court scrupulously;

(e) The applicants shall not tamper with the evidence or attempt to influence or contact any of the witnesses or persons concerned with this case;

(f) The applicants shall furnish their residential address and contact details forthwith to the respondent and the Trial Court. The applicants shall inform in case of any change in their contact details or residential address to the respondent as well as the trial Court;

(g) In case of two consecutive defaults either in attending the respondent or the Trial Court or in case of any breach of any of the aforesaid conditions, the prosecution shall be at liberty to seek cancellation of bail of the applicants.

19. The applications stand disposed of in the aforesaid terms.

[PRITHVIRAJ K. CHAVAN, J.]