

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

BAIL APPLICATION NO. 2966 OF 2023

SANTOSH
SUBHASH
KULKARNI

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Sunday

...Applicant

Versus

1. Union of India
2. The State of Maharashtra

...Respondents

Ms. Ashwini Achari, a/w Taraq Sayed, for the Applicant.
Ms. Manisha Jagtap, APP for the UOI-NCB/Respondent No.1.
Mr. R. M. Pethe, APP for the State/Respondent No.2.

CORAM: N. J. JAMADAR, J.

DATED: 16th APRIL, 2024

ORDER:-

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in Special Case No.148 2019 arising out of CR No.9 of 2019 registered with NCB, Mumbai Zonal Unit, Mumbai, for the offences punishable under Sections 21(c), 23, 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act"), has preferred this application to enlarge him on bail.
3. The applicant is a Nigerian national. The applicant came to be arrested on 5th April, 2019 in connection with the alleged seizure of 320 grams of cocaine in the following circumstances:

Specific request was received from National Crime Agency (NCA), UK, in respect of a consignment containing narcotic drug or psychotropic substance sourced from Trinidad & Tobago via UK to Mumbai. The Director General, NCB, authorised the then Superintendent and Intelligence Officer, NCB, MZU, to undertake controlled delivery in respect of the said consignment allegedly containing narcotic drug or psychotropic substances in co-ordination with NCA, UK. On 29th March, 2019, the officers of NCB collected the consignment under controlled delivery operation. The officers of NCB and the panch witnesses thereafter reached Mumbra Sub-Post Office alongwith said parcel. They were informed that the destination of the said parcel comes within the jurisdiction of Diva Post Office. The team reached Diva Post Office. However, none turned up to claim the parcel till the closing hours.

4. On 4th April, 2019 at about 3.00 p.m. the applicant approached Diva Post Office and inquired about the said parcel. While the applicant was about to collect the said parcel, he was accosted by the NCB team. Thereupon the parcel was opened in the presence of the panch witnesses. It contained cocaine. It weighed 320 grams. Samples were collected and the contraband

article was seized. The applicant came to be arrested on 5th April, 2019.

5. Ms. Achari, the learned Counsel for the applicant, submitted that no contraband was recovered from the possession of the applicant. Nor the consignment, which was collected under controlled delivery, was addressed to the applicant. Thus, there is no *prima facie* material to connect the applicant with the said consignment. It was further submitted that the said consignment was addressed to a person named Ms. Nisha Kala Swami. No material has been collected during the course of investigation to show that the applicant has any nexus with the said consignee. It was submitted that there is total non-compliance of the mandate contained in Section 52A of the NDPS Act, 1985. In any event, the applicant has been in custody for more than five years.

6. Ms. Jagtap, the learned Special PP for NCB – respondent No.1, opposed the prayer for bail. It was urged that the investigation had revealed that the applicant had frequently visited Diva Post Office in the month of February, 2019 and collected a number of deliveries booked in the name of Nisha Kala Swami. On 4th April, 2019, the applicant was apprehended when he had come to the Post Office to collect the parcel in the

name of the said Nisha Kala Swami. The applicant was, in fact, apprehended red handed. Therefore, it cannot be said that there is no nexus between the applicant and the seized contraband substance.

7. Ms. Jagtap further submitted that the non-compliance of the provisions contained in Section 52A cannot be said to be such infirmity as to justify an inference that the applicant may not be guilty of the offences punishable under NDPS Act, 1985. Thus, the interdict contained in Section 37(1)(b)(ii) of the NDPS Act, 1985 operates with full force and vigor and the applicant cannot be released on bail. It was further submitted that the applicant has antecedents which indicate that the applicant has been engaged in illicit drug trafficking. Since the applicant is a Nigerian national, there is an imminent possibility of fleeing away from justice, if the applicant is released on bail. Therefore, the application be rejected.

8. From a perusal of the mail receipt, it *prima facie* becomes evident that the sender was Doffert Y. Albert, resident of Trinidad & Tobago, and the addressee was Nisha Kala Swami, resident of Diva (E), Thane, Mumbai, India. Though an endeavour was made by Ms. Achari to urge that the controlled delivery was not effected in conformity with the provisions

contained in Section 50A of the NDPS Act, 1985, at this stage and in this proceedings, I do not deem it appropriate to delve into the said aspect elaborately. *Prima facie*, there appears proper authorization as is envisaged by Section 50A of the NDPS Act, 1985.

9. The thrust of the prosecution case is that on 4th April, 2019, while the applicant was about to take the delivery of the parcel in question, after putting his signature against the name of the addressee Nisha Kala Swami, he was accosted. The panchnama dated 4th April, 2019 records the said fact. It further records that in the search of the said parcel three silver paper wrapped packets were found. After removing the silver paper, three transparent polythene packets containing white crystalline powder were found. Upon testing of a pinch of such substance from each of the packets, with the drug detection kit, the test resulted positive for the presence of Cocaine. The entire substance was thus mixed. It weighed 320 grams. Thereupon, the Investigating Officer drew two samples of 5 gram each from the bulk and marked 'S1' and 'S2'.

10. Ms. Achari, the learned Counsel for the applicant, submitted that the panchnama thus unmistakably indicates that the samples were drawn at the time of seizure in breach of

the mandate contained in Section 52A of the NDPS Act. In fact, it is a case of total non-compliance of the provisions contained in Section 52A of the Act. Attention of the Court was invited to the test memo dated 4th April, 20219 whereunder the very sample 'S1' was sent for analysis to CA and the report of analyst dated 25th April, 2019.

11. The submission that it is a case of total non-compliance of the provisions contained in Section 52A of the NDPS Act, 1985 appears impeccable. As noted above, two samples of 5 gram each (S1 and S2) were collected at the time of the alleged search and seizure. The test memo dated 4th April, 2019 (page 220) explicitly records that the first sample 'S1' was forwarded for analysis. The CA report overleaf (page 221) further records that the chemical analyst found that the sample under reference answered positive for cocaine.

12. In a series of the pronouncements, commencing from *Union of India vs. Mohanlal and another*¹ the Supreme Court has emphasised that the drawing of the samples at the time of seizure itself is not envisaged by the provisions contained in NDPS Act, 1985.

1 (2016) 3 SCC 379.

13. In the case of *Yusuf @ Asif vs. State*², the Supreme Court after adverting to the provisions of Section 52A of the NDPS Act, 1985 and its earlier decision in the case of *Mohanlal* (supra) enunciated the law, *inter alia*, as under:

“12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under sub-sections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of subsection (2) of Section 52A of the NDPS Act.

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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”

(emphasis supplied)

14. In the case of *Simarnjit Singh vs. State of Punjab*³, the Supreme Court again adverted to the decision in the case of *Mohanlal* (supra) and considering the facts in the case of *Simarnjit* (supra), observed that the act of PW-7 of drawing samples from all the packets at the time of seizure is not in conformity with the law laid down by the Supreme Court in the case of *Mohanlal* (supra). This creates a serious doubt about the prosecution’s case that substance recovered was a contraband.

15. In the latest pronouncement in the case of *Mohammed Khalid and another vs. The State of Telangana*⁴, the Supreme Court observed in emphatic terms that since no proceedings under Section 52A of the NDPS Act, 1985 were undertaken by the Investigating Officer for preparing an inventory and obtaining samples in the presence of the jurisdictional

3 2023 SCC OnLine SC 906.

4 Criminal Appeal No(S).1610/2023, dtd.1/3/2024.

Magistrate, the FSL report is nothing but a waste paper and cannot be read in evidence.

16. Since *Mohanlal* (supra) constitutes the edifice of the aforesaid enunciation, it may be apposite to extract the observations of the Supreme Court in paragraph 17 of the judgment in the case of *Mohanlal* (supra), which read as under:

“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. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.”

(emphasis supplied)

17. In the face of these authoritative pronouncements, a complete non-compliance of the mandate contained in Section 52A may result in a situation where the prosecution would be bereft of primary evidence.

18. Reverting to the facts of the case, the fate of the prosecution case hinges on CA report, based on the analysis of samples which were drawn at the time of the alleged seizure. Conversely, no samples were drawn before the Magistrate. In view of the pronouncement of the Supreme Court in the case of ***Mohammed Khalid*** (supra) such CA Report, based on samples not drawn and certified by the Magistrate, is bereft of evidentiary value. Resultantly, the prosecution will have to surmount a *prima facie* insuperable hurdle of non-compliance of Section 52A of the NDPS Act, 1985.

19. Secondly, the fact that the applicant has been in custody for more than five years cannot be lost sight of. It is trite that a prolonged period of incarceration without a real prospect of expeditious conclusion of trial furnishes a justifiable ground to release an accused on bail as it infringes the right of the accused to speedy trial which is a facet of the fundamental right guaranteed under Article 21 of Constitution of India. It is well recognised in the face of such prolonged period of incarceration the statutory provisions which incorporate additional restrictions in the matter of grant of bail like Section 37 of the NDPS Act, 1985 melt down. Since the applicant has been in custody for more than five years, in my considered view, on the

count of long period of incarceration also, the applicant deserves to be enlarged on bail.

20. As regards the antecedents, the learned Counsel for the applicant, invited the attention of the Court to an order in NDPS Special Case No.81 of 2019, whereby the applicant has been granted bail. *Prima facie*, this long period of incarceration also deserves to be taken into account in recording a finding that in the event of the release of the applicant on bail, the applicant may not indulge in identical offences.

21. The apprehension on the part of the prosecution that the applicant may flee away in the event he is released on bail can be said to have been already taken care of as, in NDPS Special Case No.81 of 2019, the applicant has been directed to surrender his passport. Therefore, subject to the deportation proceedings that may be undertaken by the authorities on the ground of over stay in India, the applicant can be directed not to leave the country without the prior permission of the trial court.

22. Hence, the following order.

: O R D E R :

- (i) Application stands allowed.
- (ii) The applicant, Ramos Breal @ Obalu Bernard Ikechukwu

Sunday, be released on bail in Special Case No.148 2019 arising out of CR No.9 of 2019 registered with NCB, Mumbai Zonal Unit, Mumbai, on furnishing a P.R. Bond in the sum of Rs.1,00,000/- with one or more sureties in the like amount to the satisfaction of the learned Special Judge.

- (iii) The applicant shall mark his presence at NCB, Mumbai Zonal Unit, Mumbai, on the first Monday of every alternate Month, till conclusion of the trial.
- (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 not indulge in an identical activities for which he has been arraigned in this case.

- (vii) The applicant shall not leave India without the prior permission of the trial court.
- (ix) The applicant shall regularly attend the proceedings before the jurisdictional Court.
- (x) 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 stands disposed.

[N. J. JAMADAR, J.]