

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2742 OF 2023

Zaheer Gayasuddin Shaikh

...Applicant

vs.

The State of Maharashtra and Another

...Respondents

Mr. Hrishikesh Mundargi i/b. Ms. Swarali Joglekar, for the Applicant.

Ms. Aruna Pai a/w. Mr. Shailesh Ghag, for the Respondent-State.

VISHAL
SUBHASH
PAREKAR

CORAM : N. J. JAMADAR, J.
RESERVED ON : MARCH 4, 2024
PRONOUNCED ON : MARCH 14, 2024

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JUDGMENT

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

2. The applicant, who is arraigned in CR No. 25 of 2022 registered with Narcotic Control Bureau Mumbai Zonal Unit for the offences punishable under Sections 20 (b) (ii) (c), 28 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act, 1985"), has preferred this application to enlarge him on bail.

3. The indictment against the applicant and the co-accused, runs as under:-

On 27th July, 2022, a specific information was received by an

Officer of NCB that four persons, including the applicant, were to transport huge quantity of Ganja in two vehicles from Vaijapur (Aurangabad) to Mumbai and deliver the same to an unknown person near Mulund Toll Plaza. Co-accused Imran and Shoeb were to travel in a white Hyndai Accent Car bearing registration No. MH-05-J-2254. The applicant and co-accused- Javed were to travel in a brown Suzuki Ertiga bearing registration No. MH-03-BW-7444. After complying with the provisions contained in Section 42 of the NDPS Act, 1985, surveillance was conducted at Arjunalli Toll Plaza Padgha. Above described and numbered cars were intercepted. The applicant and the co-accused were accosted. They were apprised of their right to be searched before the Gazetted Officer or Magistrate. As the applicant and the co-accused declined to avail the said right, the search was conducted. In the search of the Ertiga Car No. MH-03-BW-7444. 110 kg. Ganja packed in six gunny bags was found. In the other vehicle 80 kg of Ganja was found. Contraband articles were seized. The applicant and the co-accused were arrested.

4. Mr. Mundargi, the learned counsel for the applicant, submitted that the search and seizure stands vitiated as the Authorised Officer had mixed contents of all the packets and,

thereafter, weighed the bulk. As the contents of all the packets were mixed together, it cannot be said that the applicant was found in possession of the commercial quantity of Ganja. It was further submitted that the sample drawn, after mixing the contents of all the packets, cannot be said to be representative sample of the contraband articles allegedly found in possession of the applicant. Mr. Mundargi further urged that there is a serious doubt as regards the very factum of search as the FIR number finds mention in the notice given to the applicant and the co-accused under Section 67 of the NDPS Act, 1985. Since the notice was given to the applicant and the co-accused at the place of seizure itself, it was inconceivable that the FIR number could have found mention in the said notice.

5. To bolster up of these submissions, Mr. Mundargi placed reliance on a judgment of the Supreme Court in the case of **Kamaljit Singh @ Pappu vs. State of Punjab**¹ and the orders passed by this Court in **BA No. 3269 of 2022 dated 13th July, 2023 in Chand Riyaz Shaikh S/o Riyaz Shaikh Vs. Union of India and Anr.** and in **BA No. 1296 of 2022 dated 17th March, 2023 in Ibrahim Khwaja Miya Sayyed @ Raju Vs. State of Maharashtra.**

6. In opposition to this Ms. Pai, learned Special Public

¹ (2020) 14 SCC 9

Prosecutor submitted that since commercial quantity of Ganja was found in possession of the applicant, the rigor contained in section 37 of the NDPS Act, 1985 is attracted and none of the grounds sought to be urged on behalf of the applicant justify an inference that the applicant is not guilty of the offences punishable under NDPS Act, 1985.

7. Ms. Pai submitted that the alleged mixing of the contents of the packets, in the facts of the case, does not vitiate the seizure. In any event, according to Ms. Pai, that is an aspect which can only be determined at the trial. The second ground of the FIR number having been mentioned in the notice under section 67 of the NDPS Act, 1985, also does not carry much substance as it has been held by the Supreme Court and this Court that such mentioning of FIR does not vitiate the search. Reliance was placed on the observations of the Supreme Court in the case of **Radhey Sham vs. State of Haryana**² and in a Division Bench judgment of this Court in the case of **Ali Hussain Sayyed vs. State of Maharashtra**³.

8. I have carefully perused the complaint and the documents annexed with it, the averments in the application, and the contentions in the affidavit in reply filed on behalf of respondent No.

² (2001) 10 SCC 206.

³ 1993 Cri.L.J. 277.

2. I have also given anxious consideration to the rival submissions canvassed across the bar.

9. To begin with, in view of the provisions contained in Section 37(1)(b)(ii) a person accused of an offence punishable under the Act involving commercial quantity cannot be released on bail unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty and that he is not likely to commit any offence while on bail. The term “reasonable ground” has been construed to mean something more than *prima facie* ground. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged, and this reasonable belief contemplated, in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged (**Union of India vs. Shivshankar Kesari⁴**).

10. Can the aforesaid twin tests be said to have been satisfied in this case ?

11. As noted above, Mr. Mundargi canvassed two principal

4 (2007) 7 SCC 798.

grounds. One, mixing of the contents of all the packets allegedly found in the car in which the applicant and the co-accused were traveling. The mixture of the contents of all the packets, according to Mr. Mundargi, is in clear violation of the Narcotic Drugs And Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 (Rules 2022).

12. Attention of the Court was invited to Rule 3 providing for 'classification of the seized material' and Rule 10 which regulates the 'drawing of samples'. Mr. Mundargi, submitted that these rules incorporate substantially similar provisions like the standing instruction 1/88 and standing order 1/89. The Courts have held that infarction of standing instruction 1/88 and standing order 1/89 vitiates the seizure.

13. Reliance was placed on an order passed by a learned single Judge of this Court in the case of **Chand Riyaz Shaikh** (supra), wherein it was observed that the investigating agency had not drawn the sample independently from each packet, but had mixed together the entire contraband in one packet without field test, and thereafter taken the sample and forwarded the sample to CSFL for analysis. Thus the sample was not drawn in consonance with the standing orders, and, hence, prima facie, the sample sent to CSFL was not the representative sample.

14. In the case of **Ibrahim Khwaja** (supra) this Court had considered the decision of the Delhi High Court in the case of **Amani Fidel Chris vs. Narcotics Control Bureau**⁵ wherein it was held that the mixing of the contents of container/ package (in one lot) and then drawing the representative samples was not permissible under the standing order and rightly so since such a sample would cease to be a representative sample of the corresponding container/ package.

15. Rule 10 of the Rules 2022 reads as under :-

Drawing the samples :-

(1) One sample, in duplicate, shall be drawn from each package and container seized.

(2) When the packages and containers seized together are of identical size and weight bearing identical marking and the contents of each package give identical results on colour test by the drugs identification kit, conclusively indicating that the packages are identical in all respects, the packages and containers may carefully be bunched in lots of not more than ten packages or containers, and for each such lot of packages and containers, one sample, in duplicate, shall be drawn:

Provided that in the case of ganja, poppy straw and hashish (charas) it may be bunched in lots of not more than fourty packages or containers.

(3) In case of drawing sample from a particular lot, it shall be ensured that representative sample in equal quantity is taken from each package or container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

16. In the case of **Venktesh Shiva Permal vs. The State of Maharashtra**⁶, I had an occasion to consider the aspect of mixing of

⁵ Cri. Appeal No. 1027 of 2015

⁶ BA. No.3784/2023 Dt.23/01/2024

the contents of different packets/containers and then collecting samples after adverting to the provision contained in the Standing Instruction No.1/88 and Standing Order No.1/89, the judgments of the Supreme Court in the case of **Union of India V/s. Bal Mukund and Ors.**⁷ and **Sumit Tomar vs. State of Punjab**⁸ and the decision of Delhi High Court in the case of **Amani Fidel Chris** (supra). Thereafter, in the case of **Venktesh Shiva Permal** (supra), it was observed as under:-

28. What should be the approach of the Court ? There can be no duality of opinion about the proposition that having regard to the stringent provisions against grant of bail and the severity of the punishment which the offences under NDPS Act, 1985 entail, the Court must insist scrupulous compliance of the Standing Instruction/Order. However, the nature of infraction is required to be kept in view and also the element of prejudice likely to have caused to the accused. Undoubtedly the officers are instructed that one sample from each package/container in case of seizure of more than one package/container be collected. However, the directive is preceded by the word “normally” and it is “advisable” These words, ordinarily, cannot be construed as peremptory. Since the Standing Instruction/Order use the qualifying words like “normally” and “advisable”, in my considered view, the correct approach would be to consider the impact of infraction of the directives as to the sampling alongwith other facts and circumstances of the case. Laying down a too broad proposition that the moment the investigating agency is found to have mixed the contents of the containers and thereafter collected the sample, the entire seizure is vitiated would be taking an extreme view of the matter.

7 Cri. Appeal No.1397 of 2007 dt. 31/03/2009

8 (2013) 1 SCC 395

29. At the same time, the cases of non-compliance with the Standing Instructions/Order and search and sampling in flagrant violation of such Instructions, cannot be brushed aside as mere irregularities. There ought to be material to show that the Instructions have been substantially complied with.

30. The decision of the Supreme Court in the case of **Noor Aga V/s. State of Punjab and Anr.**⁹ illuminates the path. In the said case, the Supreme Court considered the aspect of contravention of the Standing Order. Adverting to the earlier decisions in the case of **South Central Railway V/s. G. Ratnam**¹⁰, and the clarification thereof by a subsequent decision in the case of **Moni Shankar V/s. Union of India**¹¹, the Supreme Court enunciated in clear and unambiguous terms that the guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-a-vis a departmental proceeding, rigours of such guidelines may be insisted upon.

.....

32. The Court cannot lose sight of the fact that to arrive at the satisfaction that the Accused has not committed the offence, there must be a substantial probable cause. Whether the irregularity in collection of the sample vitiates the entire seizure would thus be a matter to be decided in each case in the light of the nature of infraction of the guidelines on the touchstone of substantial compliance thereof.

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34. As noted above, sub-clause (b) and (e) of the Standing Instructions 1/88 and sub-clauses 2.5 and 2.8 of the Standing Order 1/89 envisage bunching of packets/ containers in lots and thereafter, drawing of representative sample from each packet / container of that lot and mixing together to make a composite whole from which the samples are drawn for that lot. However, the principal condition is that the officer effecting the seizure must find that the packets/containers seized together are of identical size and weight bearing identical marking and contents of each packet give identical results on colour test by drug identification kit, and, thus, conclusively indicate that the packages are identical in all respects.

9 (2008) 16 SCC 417

10 (2007) 8 SCC 212

11 (2008) 3 SCC 484

35. Evidently, the underlying object of the Instructions is to ensure that the sample which is collected represents the bulk, unmistakably. Invariably, in pursuance of the provisions of the Act, and the Drug Disposal Rules, the bulk is disposed. When a person is sought to be fastened with liability for possessing a particular quantity of contraband, in bulk, on the basis of the sample collected, the Court ought to have the assurance that the sample so collected represented the entire bulk. The insistence on collecting samples from each of the packets and containers stems from this objective.

17. In the light of the aforesaid position, reverting to the facts of the case, it is imperative to note that authorized officer had a field test of the contents of the gunny bags. It is explicitly recorded that since the nature and texture of all the packets were same and all the packets were having same type of substance, all the quantity of contraband was taken out from all the packets and was mixed homogeneously. It is prima facie evident that the authorized officer had recorded a satisfaction that the packages were identical in all respects and therefore the contents were mixed. I am, therefore, not persuaded to accede to the submission on behalf of the applicant that the seizure and sampling stood vitiated on account of mixing of all the packets.

18. The second ground forcefully canvassed by Mr. Mundargi was that of the notice given to the applicant purportedly at the time of alleged seizure (page 101) found mention of the FIR number. It

was urged with a degree of vehemence that the FIR number could not have found mention in the said notice as the FIR came to be registered subsequently. Thus, a serious doubt about the genuineness of the search and seizure arises.

19. In the case of **Kamaljit Singh** (supra), the Supreme Court had adverted to the aspects of unfairness in investigation and observed that one of the glaring feature of unfairness was the FIR number having been noted at the top of search and seizure panchnamas and it was unfathomable as to how the the FIR number could be noted on the search and seizure panchanamas when the same were drawn up obviously at an earlier point in time and preceded the registration of FIR. In the case of **Chand Riyaz** (supra) also this Court had observed that the indication of crime number in the notice which was allegedly issued at the spot before the registration of crime prima facie raises a serious doubt about prosecution case.

20. To meet the aforesaid challenge, an additional affidavit was filed by Vitthal Pawar, Inspector, NCB MZU, Mumbai. It is contended that if the raid takes place and there is recovery of any contraband, then for further identification of the process, CR number is obtained by seizing officer from the crime-register in-charge as per the

running sequence. Thus, presence of C.R number on the notice under section 67 is not unusual and does not warrant any suspicion.

21. Ms. Pai, would urge that the aforesaid contention of FIR number on the notice under Section 67 is too fragile to constitute a ground to hold that the accused is not guilty of offence under NDPS Act, 1985. In the case of **Ali Hussain Sayyed** (supra) a Division Bench of this Court disagreeing with the view in the case of **Nathiya vs. State of Rajasthan**¹² had observed as under:-

6]With respect, we do not agree with the above view expressed in Nathiya's case that this seriously reflects upon the veracity of the prosecution story and that it creates a good deal of doubt. Let us take the case of articles. They were seized and sealed on the spots. Thereafter, they were taken to the police station and the C.R number was entered thereon. If they are required to be inspected and initiated by another officer then this would be done still later. If such initialling is required to be done at a specified place on the packing or labels, then such place would have to be kept blank. Even in the case of a document it may require to pass through several stages and certain endorsement would be required to be made at each stage. This does not adversely reflect upon the veracity of the prosecution story at all. Further in the present case PSI Khot has explained as to how the number came to be stated later on the panchanama and labels. If the crime register number on the panchanama is required to be entered at the time of drawing up the panchanama then in such cases no panchanama can be made on the spot. Accordingly, we reject point no. 1 as having no merit.

12 1992 Cri.L.J. 2342.

22. In the instant case, from the perusal of the notice under section 67 (page 101), it becomes evident that crime number and date and place of examination of the person to whom the notice was given were kept blank and filled in by hand. In the context of the recovery of huge contraband articles, the entire search and seizure cannot be thrown overboard at this stage, on the ground that FIR number finds mention in the notice under section 67. The explanation offered on behalf of NCB that post recovery of contraband, for future processes, the officer effecting the search obtains the running crime number from the incharge officer can not be said to be inconceivable. In any event, that is a matter for adjudication at the trial. Such a ground, in my considered view, can not qualify as the substantial probable cause to believe that the accused may not be guilty of the offence.

23. For the foregoing reasons, in the facts of the case, I am inclined to hold that the applicant has not succeeded in demonstrating that the twin test stands satisfied. The applicant, therefore, does not deserve to be released 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.)