



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.2804 OF 2023

Saad Sohel Shaikh

...Applicant

vs.

The State of Maharashtra

...Respondent

Ms. Zehra Charania i/b. Ayaz Khan, for the Applicant.

Mr. Gauri Rao, APP, for the Respondent/State.

CORAM : N. J. JAMADAR, J.

DATE : MARCH 26, 2024

P.C.:

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

2. This is an application for bail in connection with C.R. No. 800 of 2022 registered with Mumbra police station, for the offences punishable under sections 21(c) and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (NDPS Act, 1985).

3. On 29th August, 2022, an intimation was received that a person was selling contraband article near Shankar Mandir, at Ambedkar Nagar. The Mumbra police conducted a surveillance. The applicant arrived at 11.45 pm. The applicant was accosted. He was appraised of his right under Section 50 of the NDPS Act, 1985. As he declined to avail the said right, his personal search was conducted in the presence of the panch witnesses. A plastic pouch containing white substance was found in possession of the applicant. It was Mephedrone (MD). It weighed 57 grams. Samples were collected and the

contraband article was seized. The applicant came to be arrested on 30th August, 2022.

4. The learned counsel for the applicant submitted that the mandate contained in Section 50 of the NDPS Act, 1985 was not complied with scrupulously. Moreover, there is a total non-compliance of the provisions contained in Section 52A of the NDPS Act, 1985. Samples have been collected at the time of the alleged seizure in breach of the provisions contained in Section 52A of the NDPS Act, 1985 and, therefore, the trial would stand vitiated.

5. The learned APP resisted the prayer for bail. It is submitted that there is compliance of the provisions contained in sections 41 and 42 of the NDPS Act, 1985. The provisions contained in Section 50 have also been substantially complied with. The learned APP fairly submitted that there is total non-compliance of the provisions of Section 52A of the NDPS Act, 1985.

6. I have perused the allegations in the first information report as well as the seizure panchnama. After the applicant was allegedly accosted, it seems Madhuri Jadhav, the then P.I., had disclosed her identity as a Gazetted Officer and declared that she has a right to search the person of the accused, and, thereafter, the accused was apprised of the right under Section 50 of the Act. Appraisal memo also makes it clear that the Police Inspector disclosed her identity as the Gazetted Officer and then called upon the accused as to whether he would like to be searched before any other Gazetted Officer.

7. In the case at hand, the authorized officer seems to have specifically disclosed that being a Gazetted Officer, she had the right to search the applicant. Such appraisal has been held to be in violation of Section 50 of the NDPS Act as that has the tendency to dissuade the suspect from exercising the right under Section 50 of the NDPS Act, as an impression is given that he is being searched by a Gazetted Officer. Moreover, it does not appear that the applicant was specifically informed that he has a right to be searched before the Magistrate as well. Prima facie, the mandate contained under Section 50 of the NDPS Act, 1985 has not been complied with scrupulously. The search, therefore, stands vitiated.

8. It is trite law that the provisions of Section 50 are required to be scrupulously complied with. Substantial compliance of the provisions is neither envisaged by the provisions of the Act, 1985, or by the Constitution Bench judgment in the case of **State of Punjab V/s. Baldeo Singh**¹ (**Vijaysinh Chandubha Jadeja V/s. State of Gujarat**².)

9. As noted above, there is a total non-compliance of the provisions contained in Section 52-A of the Act. In a series of judgments, the Supreme Court held that compliance of Section 52-A is mandatory. In the latest pronouncement in the case of **Mohammed Khalid and another vs. The State of Telangana**³ the Supreme Court observed in emphatic terms that since no

1 (1999) 6 SCC 172

2 (2011) 1 SCC 609

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

proceedings under Section 52-A of the NDPS Act, 1985 were undertaken by the Investigating Officer for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate, the FSL report is nothing but a waste paper and cannot be read in evidence.

10. Therefore, I am inclined to hold that the first condition stipulated by Section 37(1)(b)(ii) can said to be have been satisfied on account of non-compliance of provisions contained in Section 50 and 52-A of the NDPS Act. The Court is not informed that the applicant has antecedents. Thus, the Court may be justified in drawing an inference that the Applicant may not indulge in the identical offences, if released on bail. Thus, I am inclined to exercise discretion in favour of the applicant.

11. Hence, the following order :

ORDER

I] The application stands allowed.

II] The applicant – Saad Sohel Shaikh be released on bail in C.R. No. 800 of 2022 registered with Mumbra police station, on furnishing a P.R. Bond of Rs.1,00,000/- with one or more sureties in the like amount to the satisfaction of the trial Court.

III] The applicant shall mark his presence at Mumbra police station on the first Monday of every alternate month between 11 am to 1 pm for a period of two years or till conclusion of the trial.

IV] The applicant shall not tamper with the prosecution evidence and give threat or inducement to first informant, any of the prosecution witnesses or 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) The applicant shall not indulge in identical activity for which he has been arraigned in this case.

VIII] 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.)