

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2831 OF 2023

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...Applicant

vs.

The State of Maharashtra

...Respondent

Mr. Atul Sarpande a/w. Mr. Vikas Chavan, Mr. Kamlesh Satre, for the Applicant.

Mr. S.R. Agarkar, APP, for the Respondent/State.

Mr. G.L. Shewale, PI, and Mr. S.R. Ugalmugale, Crime Branch, Thane City present.

CORAM : N. J. JAMADAR, J.

DATE : JANUARY 30, 2024

P.C.:

1. The applicant, who is arraigned in C.R. No.885 of 2021 registered with Mumbra police station for the offences punishable under sections 20 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act, 1985), seeks to be enlarged on bail.

2. On 10th September, 2021 pursuant to an intimation, Mumbra police conducted a surveillance, behind a Kalsekar hospital, Mumbra. The applicant was allegedly found on the ground behind the Kalsekar Hospital. The police party entertained a suspicion that the applicant was selling Charas. The applicant was accosted. The

applicant was apprised of his right to be searched in the presence of the Magistrate. The applicant gave consent to be searched by police. It is alleged, in the search, the applicant was found carrying a plastic bag containing a substance which appeared to be Charas. The contraband article weighed 1035 gms. It was seized and samples were collected. The applicant came to be arrested. Post completion of investigation, charge sheet has been lodged.

3. Mr. Sarpande, learned counsel for the applicant, submitted that the search is completely vitiated for non-compliance of the mandate contained in section 50 of the NDPS Act, 1985. It was further submitted that the information to the superior officer as provided under section 42(2) of the NDPS Act, 1985 was also not given. The applicant is in custody since 10th September, 2021. Therefore, as the trial would stand vitiated for non-compliance of the mandatory provisions, the applicant be released on bail.

4. Mr. Agarkar, learned APP for the State, opposed the prayer for bail. It was submitted that the applicant was found in possession of commercial quantity of contraband articles and therefore the interdict contained in section 37 of the NDPS Act, 1985 comes into play. It was submitted that there is substantial compliance with the

provisions contained in Section 50 of the NDPS Act. Since the commercial quantity of contraband article was found in possession of the applicant, the applicant cannot be released on bail.

5. Non-compliance of the provisions contained in Section 50 of the NDPS Act was sought to be substantiated by making a reference to the allegations in the FIR and the assertions in the seizure panchnama. In the FIR as well as the seizure panchnama it was mentioned that a notice was given to the applicant under Section 50 of the NDPS Act and thereupon the applicant replied in Hindi verbally as well as in writing that there was no need of search in the presence of Gazetted Officer or Magistrate.

6. To start with, the alleged non-compliance of section 50 of NDPS Act, 1985. By a catena of decisions, the legal position has been crystallized to the effect that there should be scrupulous compliance of the provisions contained in section 50 of the NDPS Act, 1985 and the contention that there is substantial compliance of the mandate contained in section 50 of the NDPS Act, 1985 does not merit countenance.

7. In the backdrop of the stringent punishment which the

offences under the NDPS Act, 1985 entail and the statutory restrictions in the matter for grant of bail, scrupulous compliance of the provisions contained in section 50 of the NDPS Act, 1985 is insisted upon. The non-compliance of the said provision causes serious prejudice to the accused as he is deprived of the statutory right to be searched in the presence of the Gazetted Officer or a Magistrate. This measure is introduced by the legislature to act as a dyke against planting or false implication.

8. Reverting to the facts of the case, in the FIR as well as the seizure panchanama, it is recorded that the empowered officer allegedly informed the applicant that the applicant had right to be searched in the presence of “another” Magistrate or gazetted officer. The appraisal note dated 10th September, 2021 (page 31 of the application) indicates that the question that was put to the applicant was, “since Mr. Gitaram Shevale, the empowered officer was himself a gazetted officer, whether the applicant desired to be searched in the presence of another gazetted officer and, if he so desired, another gazetted officer would be called.”

9. Prima facie, the aforesaid appraisal is in teeth of the provisions of section 50 of the Act, 1985. The appraisal of the right to be

searched under section 50 of the Act, 1985 has to be clear and unambiguous. The assertion of the empowered officer that he himself was a gazetted officer has the effect of making the person to be searched to believe that he can not insist for the search in the presence of another gazetted officer. Secondly, the appraisal memo does not indicate that the applicant was informed of his right to be searched in the presence of the Magistrate. Thus it suffers from twin infirmities. One, declaration by empowered officer that he himself was a gazetted officer. Two, the omission to apprise the applicant of his right to be searched in the presence of the Magistrate.

10. Prima facie, the communication of the right under section 50 of the Act, 1985 appears infirm. It would be suffice to make a reference to the Constitution Bench judgment of the Supreme Court in the case of **Vijaysinh Chandubha Jadeja vs. State of Gujarat**¹, wherein the Supreme Court enunciated that the concept of “substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in **Joseph Fernandes vs. State of Goa**² and **Prabha Shankar Dubey**

1 2011(1) SCC 609.

2 (2000)1 SCC 707.

vs. State of M.P.³, **Krishna Kanwar vs. State of Rajasthan**⁴ is neither borne out from the language of sub-section (1) of section 50 nor it is in consonance with the dictum laid down in the case of **State of Punjab vs. Baldev Singh**⁵. In **Baldev Singh** (supra) The Supreme Court emphasized that in so far as the obligation of the authorized officer under sub-section (1) of Section 50 of the NDPS Act is concerned it is mandatory and requires strict compliance. Failure to apply that provision 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 with the person of the accused during such search.

11. The conspectus of the aforesaid consideration is that for want of scrupulous compliance of the mandate contained in section 50 of the Act, 1985, the search, prima facie, stands vitiated. Therefore, an inference can be justifiably drawn that the applicant may not be guilty of the offences punishable under sections 20 and 22 of the NDPS Act, 1985 with which he stands charged.

12. The Court is not informed that there are antecedents of the

3 (2004) 2 SCC 56.

4 (2004) 2 SCC 608.

5 (1999) 6 SCC 172.

applicant which would justify an inference that if the applicant is released on bail, he would indulge in identical offences. Thus, the twin test can be said to have been satisfied.

13. In any event, the applicant is in custody since 10th September, 2021. Having regard to the large pendency of the cases, it is unlikely that the trial can be concluded within a reasonable period. Long period of incarceration with no reasonable prospect of expeditious conclusion of trial also justifies the exercise of the discretion to grant bail, despite statutory restrictions as the rigour melts down on account of the infringement of the right to speedy trial. I am, thus, inclined to allow the application.

Hence, the following order.

ORDER

1] The application stands allowed.

2] The applicant be released on bail in C.R. No.885 of 2021 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 learned Special Judge.

3] The applicant shall mark his presence at the Mumbra police station on the first Monday of every month in between

10.00 am. to 12.00 noon for the period of three years or till conclusion of the trial, whichever is earlier.

4] 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.

5] 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.

6] The applicant shall regularly attend the proceedings before the jurisdictional Court.

7] The applicant shall not indulge in identical activity for which he has been arraigned in this case.

8] 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.)