

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

BAIL APPLICATION NO. 2981 OF 2023

Abid Haniff Qureshi. ...Applicant

vs.

The State of Maharashtra ...Respondent

Mr. Shreerat Kamath a/w. Ms. Puja Yadav, Advocate for applicant.

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

IO, API S.R. Padri, Sakinaka/Pantnagar Police Station.

CORAM : N. J. JAMADAR, J.

DATE : MAY 6, 2024

P.C.:

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

2. The applicant, who is arraigned in C.R. No. 4 of 2021 registered with Sakinaka Police Station for the offences punishable under sections 8(c), 20(b) II(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985("NDPS Act") seeks to be enlarged on bail.

3. On 14th January, 2021, while the police were on patrolling duty, an intimation was received that Ganja was stored in Room No.

103, Shri Samarth Building, Sangharsh Nagar SRA, Chandivali, Mumbai. A raid was conducted. 10 gunny bags containing ganja were seized therefrom. Co-accused Ashok Manik Mhetre who was in occupation of the said room came to be arrested. Mohd. Dilshad Mohd. Ayub Shaikh, another co-accused who had transported the contraband articles to the said room was also apprehended.

4. During the course of investigation, it transpired that the applicant was one of the 3 persons who were seen in the CCTV footage unloading the contraband articles in room No. 103. The applicant came to be arrested. During the course of interrogation on 21/1/2021 the applicant made a disclosure statement to point out the place where he had kept the contraband articles procured from Accused No.1-Ashok Manik Mhetre. The applicant led the police party to a room, opened the said room and pointed out gunny bags kept on the mezzanine floor. The said gunny bags contained 20 kg. 156 grams ganja. It was seized. The samples (C1 and C2) were collected.

5. The learned Counsel for the applicant submitted that the contraband article was allegedly found in possession of the applicant

on 21st January, 2021. However, inventory was conducted before the learned Magistrate on 13th October, 2021. The said inventory is also of no assistance to the prosecution as there is no material to show that the articles which were allegedly recovered from the possession of the applicant were produced before the learned Magistrate. The inventory panchanama does not refer to the bulk that was allegedly recovered from the possession of the applicant. It was further submitted that the samples were already forwarded to CA on 10th February 2021 and the prosecution case rests on the CA report which is based on the analysis of the samples collected at the time of the alleged incident. Therefore, there is non compliance of mandate contained in section 52A of the NDPS Act.

6. The learned APP resisted the prayer for bail. It was submitted that there is compliance of the provisions contained in section 52A of the NDPS Act, though belatedly. Since a commercial quantity was found in possession of the applicant, the interdict contained in Section 37 of the NDPS Act comes into play and the applicant does not deserve to be released on bail.

7. I have perused the report under section 173 of the Code and

the documents annexed with it. The applicant came to be apprehended on the basis of the statement of the co-accused. It further appears that the complicity of the applicant is sought to be established on the basis of the CCTV footage and the transcript of the conversation between the applicant and the co-accused. Evidently, the contraband was recovered pursuant to the disclosure allegedly made by the applicant.

8. From the perusal of the seizure memo (page 63) it becomes evident that 20.156 kg. ganja was allegedly seized from the possession of the applicant. The quantity seized is marginally in excess of the commercial quantity of ganja.

9. The aspect of non-compliance of the mandate contained in section 52A of the NDPS Act is required to be appreciated in light of the delay in conducting the inventory and the identity of the substance which was allegedly recovered from the possession of the applicant and the one in respect of which proceedings under section 52A of the NDPS Act were conducted before the learned Magistrate. In the seizure memo, the bulk was marked "C".

10. The seizure memo does not give any indication as to whether

the contraband was in a loose state or concealed in packets. It is necessary to note that in the inventory panchanama, there is no reference to the bulk (C) allegedly recovered from the applicant. In these circumstances, prima facie, there is no material to connect the contraband substance which was recovered from the possession of the applicant and the contraband substance in respect of which the proceedings under section 52A of the NDPS Act were conducted.

11. Secondly, the forwarding letter (page-99) indicates that the sample of the substance recovered from the applicant (C-1 and C-2) were forwarded to CA on 10th February 2021. The CA report dated 15th November, 2021 indicates that the analysis was based on the samples received on 10th February, 2021. Indisputedly the CA report is based on the analysis of the samples collected at the time of seizure. Conversely, the inventory panchanama does not reveal that samples were collected before the Magistrate and thereafter samples were forwarded to the analysis.

12. In the aforesaid context, Mr. Kamath placed a strong reliance on three recent Supreme Court judgments and orders which emphasise that the compliance of the provisions contained in Section

52A is mandatory. In the case of *Yusuf @ Asif vs. State*¹, the Supreme Court after adverting to the provisions of Section 52A of the NDPS Act, 1985 and its earlier decision in the case of *Union of India vs. Mohanlal and Anr.*² 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.

.....

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

1 Criminal Appeal No.3191/2023.

2 (2016) 3 SCC 379.

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)

13. 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.

14. In the latest pronouncement in the case of *Mohammed Khalid and another vs. The State of Telangana*⁴, the Supreme Court observed

3 2023 SCC OnLine SC 906.

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

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

15. 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)

16. The material on record reveals infirmity in the sampling and proceedings under section 52A of the NDPS Act, 1985. Thus, the prosecution will have to surmount the challenge of non compliance of section 52A of the NDPS Act, 1985 in letter and spirit and therefore, I am inclined to hold that a substantial probable cause is made out to believe that the accused may not be guilty of the offences for which he has been arraigned.

17. Learned APP submits that the applicant has antecedents. He has been arraigned in C.R. No. 6 of 2021 registered with DCB CID Unit IX.

18. Learned Counsel for the applicant submits that in the said crime, the applicant has been arraigned on the basis of the statement of the co-accused. Nothing has been recovered from the possession of the applicant.

19. I have perused the charge-sheet in C.R. No. 6 of 2021 registered with DCB CID, Unit No. IX. No contraband was found in the possession of the applicant, therein.

20. In the aforesaid view of the matter I am inclined to exercise

discretion in favour of the applicant.

21. Hence, the following order.

ORDER

- 1] The application stands allowed.
- 2] The applicant Abid Haniff Qureshi be released on bail in C.R. No. 4 of 2021 registered with Sakinaka Police Station, on furnishing a P.R. Bond of Rs. 50,00,000/- with one or more sureties in the like amount.
- 3] The applicant shall mark his presence at Sakinaka Police Station on the first Monday of every alternate month between 11 am to 1 pm till conclusion of the trial.
- 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] 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.

8] Application is disposed of accordingly.

(N. J. JAMADAR, J.)