

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 3026 OF 2023

SANTOSH
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Lalit Subramanyam Kaudar
Versus

...Applicant

The State of Maharashtra

...Respondent

Mr. Angad More, a/w Akhilesh Singh, for the Applicant.
Mr. Tanveer Khan, APP for the State/Respondent.
PSI S. L. Doke, Borivali Police Station, present.

CORAM: N. J. JAMADAR, J.
DATED: 19th MARCH, 2024

ORDER:-

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in NDPS Special Case No.1356 of 2021 arising out of CR No.46 of 2021 registered with Borivali Police Station, Mumbai, for the offences punishable under Sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act, 1985"), has preferred this application to enlarge him on bail.
3. On 4th August, 2021, Borivali Police were on patrolling duty near Adinath Tower, Borivali (West). The movements of two persons standing on the roadside appeared suspicious. They were accosted. As they give evasive answers, panch witnesses

were called. The prosecution alleges in the presence of the panch witnesses after apprising each of the four suspects their right to be searched in the presence of a Gazetted Officer or Magistrate, personal search was conducted. In the search of the applicant, a plastic pouch containing white substance was found. It turned out to be Mephedrone (MD). It weighed 93 gms. The contraband article was seized and samples were collected. The personal search of three other suspects co-accused was also conducted. However, no contraband article was found in possession of any of those three persons. After effecting seizure of the other incriminating articles found in possession of those persons, all the accused came to be arrested.

4. Mr. More, the learned Counsel for the applicant, submitted that there is a non-compliance of Section 50 of the NDPS Act. Secondly, there is a discrepancy in the number of persons, who were initially found to be moving suspiciously i.e. two, and the number of suspects actually apprehended i.e. four. Likewise, the identity of the sample, which was sent for analysis to FSL, and, the sample, which was collected at the time of seizure, is not established. The CA Report indicates that the analyst has received a press sealed polythene bag. Whereas, the forwarding letter indicates that the container of sample was stapled and

tied with thread. Lastly, it was urged that there is a non-compliance of the mandate contained in Section 52A of the NDPS Act, 1985. Therefore, the applicant deserves to be enlarged on bail.

5. As against this, Mr. Khan, the learned APP, submitted that the applicant was found in possession of commercial quantity of MD and, therefore, the interdict contained in Section 37 of the NDPS Act, 1985 comes into play. There is no ground to believe that the applicant is not guilty of the offences for which he has been arraigned. Mr. Khan submitted that there is full compliance of the mandate contained in Section 50 of the NDPS Act and the alleged discrepancy in the identity of the sample would be a matter for trial. Mr. Khan however fairly submitted that the provisions contained in Section 52A have not been complied with.

6. It is true in the FIR the first informant alleged that the police party had noticed two suspects and later on, four persons were accosted. However, the panchnama of seizure records that the police party had pointed out four persons to the panchas. Thus, the controversy can only be resolved by adducing evidence at the trial.

7. The ground of non-compliance of Section 50 of the NDPS Act also does not carry much substance. In the FIR as well as the panchnama, it has been categorically recorded that the applicant was apprised of his right to be searched in the presence of Gazetted Officer or Magistrate and the applicant declined to avail the said right. The appraisal memo (page 158) indicates that the applicant was apprised of his right to be so searched and the applicant declined to avail the said right.

8. The ground of non-compliance of Section 52A of the NDPS Act, 1985, however, deserves consideration. A plain reading of the provisions contained in Section 52A of the NDPS Act, 1985 would indicate that when any contraband / narcotic substance is seized and forwarded to the Officer in-charge of the nearest police station or to the officer empowered under Section 53 of the Act, the Officer referred to in sub-section (1) of Section 52-A shall prepare the inventory of contraband / narcotic substance containing details and the description of the seized substance, like quality, quantity, mode of packaging, marks, number or such other identifying particulars of the contraband or packing in which they are packed, country of origin and other particulars, as may be found relevant and make the application to any Magistrate for the purpose of certifying the correctness of

the inventory so prepared and for taking photograph and certifying such photograph as true and for allowing to draw representative samples of such substance in the presence of such Magistrate and certifying the correctness of list of samples so drawn.

9. Sub-section (3) of Section 52-A enjoins the Magistrate to allow the application, as soon as may be. Sub-Section (4) of Section 52-A, which begins with non-obstante clause qua Indian Evidence Act and the Code of Criminal Procedure, 1973, provides that every Court trying an offence under the said Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

10. In the case of *Union of India V/s. Mohanlal and Anr.*¹ the Supreme Court held that the procedure prescribed in Section 52-A is of mandatory nature and it was obligatory to prepare an inventory of seized contraband and then make an application to the Magistrate for the purpose of getting its correctness certified. The observations in paragraphs 15 to 17 read

1 (2016) 3 SCC 379.

as under :

“15.It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

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.”

(emphasis supplied)

11. In the case of *Yusuf @ Asif V/s. State*², the Supreme Court after following the decision in the case of *Union of India V/s. Mohanlal* (supra), enunciated, as under :

“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.”

12. In the case of *Simaranjit Singh V/s. State of Punjab*³ the Supreme Court after extracting the observations in paragraphs 15 to 17 (extracted above) in the case of *Mohanlal* (supra), observed that the act of the officer drawing samples from all the packets at the time of seizure is not in conformity with the law laid down by Supreme Court Court in the case of *Mohanlal* (supra). That creates a serious doubt about the prosecution case that substance recovered was a contraband, and the Supreme Court, thus, set aside the judgment of conviction and sentence.

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

3 2023 SCC Online SC 906.

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

14. As the instant case is one of total non-compliance of the provisions contained in Section 52A of the NDPS Act, and thus, the probative value of the CA Report which is based on the samples collected at the time of seizure (not before the Magistrate), would be seriously questionable, in view of the aforesaid pronouncements of the Supreme Court. It can thus be said that there is a reasonable ground to believe that the accused may not be guilty of the offences with which he has been charged. The Court is not informed that the applicant has antecedents. Thus, an inference becomes justifiable that the applicant may not indulge in identical offences if released on bail. Consequently, the twin test can be said to have been satisfied.

15. It is also relevant to note that the applicant has been in custody since 5th August, 2021. It is unlikely that the trial can be concluded within a reasonable period and on the ground of long incarceration also, the applicant deserves exercise of discretion.

16. Hence the following order:

: O R D E R :

- (i) The Application stands allowed.
- (ii) The Applicant be released on bail in NDPS Special Case

No.1356 of 2021 arising out of CR No.46 of 2021 registered with Borivali Police Station, Mumbai, on furnishing a PR bond in the sum of Rs.1,00,000/- with one or two sureties in the like amount to the satisfaction of the Special Court.

- (iii) The applicant shall mark his presence before Borivali Police Station on first Monday of every month between 11 am to 1 pm for a period of three years or till the conclusion of the trial, whichever is earlier.
- (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 identical offences for which has has been arraigned.
- (vii) The applicant shall regularly attend the proceedings

before the jurisdictional Court.

- (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.]