

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

BAIL APPLICATION NO. 3092 OF 2023

SANTOSH
SUBHASH
KULKARNI

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Parvej Mahmajanmiya Ansari	...Applicant
Versus	
The State of Maharashtra	...Respondent

Mr. Mithilesh Mishra, i/b Agastya Desai, for the Applicant.
Mr. S. R. Aagarkar, APP for the State/Respondent.

**CORAM: N. J. JAMADAR, J.
DATED: 22nd APRIL, 2024**

ORDER:-

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in NDPS Special Case No.1055 of 2021 arising out of CR No.24 of 2021 registered with Anti Narcotic Cell (ANC), Kandivali Unit, Mumbai, for the offences punishable under Sections 20(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. The indictment against the applicant is that on 8th May, 2021, specific information was received that a person was to come near Nanasaheb Dharmadhikari Chowk, Western Express Highway, near National Park, Borivali, to sell *charas*. A surveillance was mounted. At about 12.45 p.m. the applicant,

whose features matched the description furnished by the informant, came near the said spot alongwith a luggage bag. His movements appeared suspicious. He was accosted. He was apprised of his right to be searched before the nearest Magistrate or Gazetted Officer. He declined to avail the said right. In the search of the applicant, 28 rectangle shaped cubes were found. The empowered officer scraped out a small part of the each of the cubes and tested the same with the help of the drug detection kit. The test turned out positive for *charas*. The contraband weighed 14 kg. 56 grams. The bulk ('A') was seized and two samples ('A1' and 'A2') of 25 grams each were collected. The applicant came to be arrested.

4. The applicant had preferred an application for bail being BA/1058/2023. However, the said application was withdrawn, without the Court having entered into the merits, with liberty to file a fresh application.

5. In the meanwhile, the trial commenced. Ganpat Gawas (PW-1) the first informant came to be examined. During the course of examination-in-chief of PW-1 when the seized *muddemal* property was produced before the learned Special Judge in addition to the bulk, two envelopes ('A1' and 'A2') containing the samples were produced before the Court. The

applicant claims that it transpired that the sample of *charas* (marked 'A1'), which was allegedly collected at the time of seizure was not at all sent to the FSL for analysis and yet the CA report dated 24th August, 2021 records that the sample 'A1' sent vide letter dated 9th March, 2021 was analysed.

6. In the wake of aforesaid contention of the applicant, an affidavit-in-reply came to be filed on behalf of respondent – State. An endeavour is made to demonstrate as to how the search and seizure has been effected in conformity with the provisions of NDPS Act, and since commercial quantity of *charas* was found in possession of the applicant, the interdict contained in Section 37 of the NDPS Act, 1985 operates. However, the deponent refrained from dealing with the contentions of the applicant that both the samples 'A1' and 'A2' were found kept in the *muddemal* and, therefore, the CA Report does not command any evidentiary value.

7. Mr. Mishra, the learned Counsel for the applicant, submitted that, on the one hand, there is a serious lacuna in the prosecution case as the both the samples 'A1' and 'A2' were found in the *muddemal* property VPR No.371 of 2022, and, on the other hand, the CA Report loses evidentiary value as no sample can thus be said to have been sent for analysis. It was

submitted, at any rate, the CA Report is not based on the sample collected before the learned Magistrate in conformity with Section 52A of the NDPS Act, 1985. Therefore, the prosecution case becomes wholly unsustainable. As the applicant has been in custody since more than three years, the applicant deserves to be enlarged on bail.

8. In opposition to this, Mr. Aagarkar, the learned APP, strongly resisted the prayer for bail. It was submitted that at this stage the Court cannot delve deep into the aspects of veracity and reliability of seizure as it is a matter for trial. The weight to be attached to the testimony of the witnesses is a matter for final adjudication.

9. The relevant part of the examination-in-chief of the Ganpat Gawas (PW-1), the first informant, reads as under:

“11. I can identify the muddemal seized if shown to me. Now the two sealed envelope of VPR No.371/2022 are produced before the Court.

(At this stage Ld. APP sought permission to open the said sealed envelopes of VPR No.371/2022. Permission is granted.)

12. Now the sealed envelopes of VPR No.371/2022 are opened in the Court. On opening of the first envelope of VPR No.371/2022, one plastic envelope containing two sealed brown colour envelopes having Exh.-A-1 & A-2 are found therein. Now the sealed second envelope of VPR No.371/2022 is opened in the Court. On opening of the said envelope one green colour sealed envelope having Exh-A-3 is found therein.

.....

15. The envelope of Article-1 is open court and one small plastic bag containing some black colour substance is found therein. The above plastic bag containing black colour substance is marked as Article-1/1b. The said substance is charas.

16. Now the sealed envelope marked as Exh-A-2 is shown to the witness. Witness states that it bears signature of PSI-Rane, both the panch witness and accused on the front side. On the rear side there is label signed by PI-Kadam there are three wax seal. The above sealed envelope Exh-A-2 is marked as **Article-2**. I can identify of inner contents if shown to me.

(At this stage Ld. APP sought permission to open the said envelope of Article-2. Permission is granted)."

10. It would be contextually relevant to note that the seizure panchnama *inter alia* records that two samples of 25 grams each were collected and marked 'Exh-A1' and 'Exh-A2'. The bulk weighing 14 kg. and 56 grams was seized, sealed and labeled 'A'. The forwarding letter dated 9th March, 2021 (page 48) indicates that the first sample 'A1' weighing 25 grams was forwarded to the FSL. The CA Report dated 24th August, 2021 (page 217) records that the sample 'A1', sent vide outward No.136/2021, was received on 9th March, 2021 and the test was positive for *charas*.

11. In the aforesaid view of the matter, the fact that both the samples 'A1' and 'A2' were found kept in VPR No.371/2022 *prima facie* dents the prosecution case that one of those samples i.e. ('A1') was forwarded for analysis to the FSL on 9th March, 2021. The discrepancy cannot be brushed aside as

immaterial or inconsequential. The fact that both the samples were found in VPR 371/2022, *prima facie*, throws a cloud of doubt over the CA Report as the necessary nexus between the sample of the contraband which was recovered from the possession of the applicant and the sample which was sent for analysis gets snapped.

12. The matter can be looked at from a different perspective. The inventory seems to have been conducted on 16th November, 2022 after about 18 months of the seizure of the contraband allegedly from the possession of the applicant. The learned Magistrate has certified that the IO had already drawn a sample and forwarded the same to CA and out of the remaining contraband the Investigating Officer intended to draw one reserve sample in the said inventory. Therefore, inventory of the remaining contraband substance was prepared in his presence. The inventory, however, does not indicate that a sample was drawn before the learned Magistrate and again forwarded to FSL for analysis.

13. In a number of decisions, the Supreme Court has emphasised that drawing of samples at the time of the seizure of the contraband substance is not envisaged by the provisions

of NDPS Act, 1985. 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 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

1 Criminal Appeal No.3191/2023.

2 (2016) 3 SCC 379.

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)

14. 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 regarding the prosecution’s case that substance recovered was a contraband.

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. In a recent 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.

17. The situation in the case at hand is further exacerbated by the fact that the evidentiary value of the CA Report is in the corridor of uncertainty as the very sample ('A1'), which the Investigating Officer claimed to have forwarded to the FSL for analysis ('Exh-A1'), was found kept in VPR No.371/2022. Even

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

otherwise, the CA Report is based on analysis of the sample collected at the time of the seizure and not before the learned Magistrate. In this view of the matter, the prosecution will have to surmount a challenge based on an apparent lacuna in the evidence adduced by the prosecution and the non-compliance of the mandate contained in Section 52A of the NDPS Act, 1985 in true spirit.

18. It is true the trial has commenced. However, the Court cannot lose sight of the fact that during the course of evidence an apparent lacuna has emerged in the prosecution case. Moreover, since the applicant has been in custody for more than three years, further detention of the applicant in the circumstances of the case, does not seem warranted. In the aforesaid view of the matter, a substantial probable cause to believe that the applicant may not be guilty of the offence can be said to have been *prima facie* made out. It is not the case of the prosecution that the applicant has antecedents.

19. I am, therefore, persuaded to exercise discretion in favour of the applicant, though the trial has commenced as, in the peculiar facts of the case, further detention of the applicant appears unjustifiable.

20. 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.1055 of 2021 arising out of CR No.24 of 2021 registered with Anti Narcotic Cell (ANC), Kandivali Unit, Mumbai, on furnishing a PR bond in the sum of Rs.1,00,000/- and one or two sureties in the like amount to the satisfaction of the Special Court.
- (iii) The applicant shall mark his presence before Anti Narcotic Cell, Kandivali Unit, Mumbai, on the first Monday of every month between 10.00 a.m. to 12.00 noon 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 her 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) 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.]