

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 3105 OF 2023

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Najma Ahmed Ali Shaikh ...Applicant
Versus
State of Maharashtra ...Respondent

Mr. Mandar Goswami, a/w Dilip Mishra, for the Applicant.
Mr. S. R. Aagarkar, APP for the State/Respondent.
PSI Sachin Palve, ANC Ghatkopar Unit, Mumbai.

CORAM: N. J. JAMADAR, J.
DATED: 6th MARCH, 2024

ORDER:-

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in NDPS Special Case No.803 of 2021 arising out of CR No.7 of 2021 registered with Anti Narcotic Cell (ANC), Ghatkopar Unit, Mumbai, for the offences punishable under Sections 20(c) and 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act"), has preferred this application to enlarge her on bail.
3. The indictment against the applicant runs as under:

On 15th January, 2021, a specific information was received at ANC, Ghatkopar Unit that a lady, whose features were described, was to come in front of the gate of Patwardhan

Garden, Linking Road, Bandra (E), to sell Mephedrone (MD). The police conducted a surveillance at the said place.

4. At about 12.50 pm. the applicant whose features matched with those described by the informant, came in front of the gate of Patwardhan Garden. The applicant was looking for someone. Her movements appeared suspicious. The applicant was accosted. She was apprised of her right to be searched before the Gazetted Officer or Magistrate, under Section 50 of the NDPS Act, 1985. The applicant declined to avail the said right.

5. In the search of the black plastic bag which was being carried by the applicant at that time, a transparent polythene packet containing white substance and cash of Rs.20,000/- were found. The said substance appeared to be MD. It weighed 100 gm. The contraband article was seized. Samples were collected. The applicant came to be arrested.

6. Pursuant to the disclosure statement made by the applicant 2 kg 720 gm *charas* and cash of Rs.9,45,000/-, which appeared to be the proceeds of illegal drug trade, were recovered. Post completion of investigation, charge-sheet came to be lodged.

7. Mr. Goswami, the learned Counsel for the applicant, submitted that the statutory safeguards contained in Sections 42 and 50 of the NDPS Act, 1985 have not been scrupulously

followed. Secondly, there is a complete non-compliance of the mandate contained in Section 52A of the NDPS Act, 1985. Laying emphasis on this ground, Mr. Goswami would urge that since the applicant has been in custody for more than three years and, eventually, for want of compliance of the mandatory provisions contained in Section 52A, the trial would be liable to be vitiated, further detention of the applicant would be wholly unwarranted.

8. Mr. Aagarkar, the learned APP for the State, submitted that the provisions contained in Sections 42 and 50 have been complied with in letter and spirit. However, Mr. Aagarkar fairly submitted that there is non-compliance of the provisions contained in Section 52A of the NDPS Act, 1985.

9. I have perused the report under Section 173 of the Code of Criminal Procedure, 1973 ("the Code") and the documents annexed with it. *Prima facie*, it appears that there is compliance of the provisions contained in Section 42 as well as Section 50 of the NDPS Act. The officer, who received the information seems to have taken down the information in writing and forwarded a copy thereof to the superior officer. As regards the compliance of the mandate contained in Section 50 of the NDPS Act, 1985, it appears that the applicant was apprised about her

right to be searched before the Gazetted Officer or Magistrate, verbally as well as in writing. The appraisal memo (page 34) lends requisite support to the prosecution's version of compliance. Mr. Goswami made an endeavour to urge that the compliance memo does not indicate that the applicant had declined to be searched before the Gazetted Officer or Magistrate. I am afraid, in the face of the material on record, such a ground can be urged on behalf of the applicant.

10. As noted above, the learned APP fairly submitted that there is non-compliance of the provisions contained in Section 52A of the NDPS Act, 1985. *Prima facie*, it appears to be a case of complete non-compliance of Section 52A and not a case of belated or otherwise infirm compliance. The samples of alleged contraband articles were evidently collected at the time of seizure itself and those very samples were forwarded to the FSL for analysis.

11. In the aforesaid context, Mr. Goswami 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

¹Criminal Appeal No.3191/2023.

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 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)

12. 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.

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.

³2023 SCC OnLine SC 906.

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

14. 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)

15. In the face of these authoritative to pronouncements, the complete non-compliance of the mandate contained in Section 52A may result in a situation where the prosecution would be bereft of primary evidence.

16. Moreover, the applicant has been in custody for more than three years. Having regard to huge pendency of the cases, it is extremely unlikely that the trial can be concluded within a

reasonable period. This period of incarceration if considered in the backdrop of a complete non-compliance of the statutory provisions contained in Section 52A of the NDPS Act, 1985, may justify an inference that further detention of the applicant would be unjustifiable. Thus, in the facts of this case, the interdict contained in Section 37(1)(b)(ii) may not constitute an impediment in releasing the applicant on bail. I am, therefore, impelled to exercise the discretion in favour of the applicant.

17. 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.803 of 2021 arising out of CR No.7 of 2021 registered with Anti Narcotic Cell, Ghatkopar 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 her presence before Anti Narcotic Cell, Ghatkopar Unit, Mumbai, on the first Monday of every month between 10.00 am 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.]