

rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.3003 OF 2022

Imran Kamaluddin Shaikh	]	..	Applicant
vs.			
State of Maharashtra	]	..	Respondent

Mr.Ayaz Khan, for the Applicant.

Ms.Mahalaxmi Ganpathy, APP for the State.

CORAM : BHARATI DANGRE, J

DATE : 3rd May, 2024.

P.C.

1] The Application filed by the Applicant Imran Kamalluddin Shaikh, is placed before me, since Khalikul Jama Khan @ Khalli @ KK @ Khalli Bhai, who is arraigned as an accused in the same CR was released on bail by the order passed on 23.09.2022.

2] I have heard the learned counsel Mr.Ayaz Khan for the Applicant and Ms. Mahalaxmi Ganpathy the learned APP for the State.

The Applicant face an accusation in CR No.2/2020 which has invoked Section 8(C), 22, 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985, (NDPS Act), registered with Anti Terrorism Squad, Police Station Kalachowky, Mumbai on 15.07.2020.

The informant is Assistant Police Inspector attached to Anti Terrorism Squad, Juhu Unit, Mumbai, who informed that, while he was

on duty, the Unit In charge Police Inspector summoned the Officers and staff and informed about information received, that persons named Dilshad alongwith his associate Khalikujma are likely to arrive at 90 ft. Road, Sakinaka, at around 16.00 hours to sell drugs. Accordingly, two teams were formed and necessary instructions were issued after conducting pre-trap panchanama. The details of pre-trap Panchama, were recorded in the Station diary.

As per the information received, two persons arrived near Wajid Ali Compound and noticing their suspicious behaviour, the attention was focused on them. In the meantime, even a third person arrived on the spot and even his behaviour was found to be suspicious.

On the necessary signal being received, that they are the same persons in respect of whom information is received, they were attempted to be apprehended. On realizing this step, they had a scuffle with the police team in which one of the accused succeeded in fleeing from the spot.

The two persons who were apprehended disclosed their names as Dilshad Khan and Imran Kamaluddin Shaikh (present Applicant.)

3] Upon search, the person Dilshad Khan was found to carry a bag which contained a white colour plastic bag in which some white colour powder was found and on it being weighed on the weighing machine, it measured 1.575 grams and the accused disclosed that the powder was MD (Mephedrone) . The samples were drawn on the spot and put in a zip lock transparent plastic bag, packed in brown colour envelope and the packets were sealed. Another bag containing whitish yellow colour powder which weighted 925 grams and even that was found to be MD and the same procedure was followed by collecting the samples and two samples of 10 gram each were taken out at the spot and bulk

was marked separately.

Apart from this, 925 grams of MD was also seized from another pouch of which samples were drawn.

As far as the present Applicant is concerned, he is accused to be in possession of 250 grams of MD and two samples of 10 gram each were taken out at the spot and bulk was marked separately.

4] On completion of investigation, charge sheet was filed on 08.01.2021 and the case is numbered as Special Case No.35/2021.

Much after the arrest of the accused persons and drawing of the samples on the spot, on 13.07.2021 the prosecution filed an Application before the Magistrate for conducting the proceedings under Section 52A for destruction of the bulk and pursuant thereto, the prosecution withdraw the bulk from the godown.

5] Mr. Khan has invited my attention to the said Application, which admittedly is for destruction of the bulk and not for collection of samples.

Mr. Khan has placed reliance upon a series of decisions revolving around Section 52A of the NDPS Act.

By placing reliance upon the decision of the Apex Court in *Union of India vs. Mohanlal and Another*, (2016) 3 SCC 379, he would submit that by the said decision, directions were issued to the Central Government and State Government for seizure and sampling of the samples drawn during the search by emphasizing upon importance of the samples, during the primary evidence in NDPS Trial.

The Apex Court expected application of uniform practices in this regard and necessary directions were issued to review the procedure for search, disposal or destruction of the Narcotics Drugs and the

remedial steps that need to be taken to plug the loopholes and the relevant observation from the said decision reads to the following effect :-

“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.”

6] Pursuant to the above decision, in various cases, the Apex Court as well as this Court, has taken stand on the non compliance of this mandate.

In the case of *Bothilal vs. The Intelligence Officer, Narcotics Control Bureau*, in Criminal Appeal No.451 of 2011, the non compliance of Section 52A and drawing of samples from all packets at the time of seizure was held to be not in conformity with the decision in the case of *Mohanlal (supra)* and it was concluded that it created a serious doubt

about the prosecution case, that the substance recovered are contraband.

By categorically recording that the case of the prosecution is not free from suspicion as the prosecution has not proved it beyond reasonable doubt that the Appellants in two Appeals were in possession of Contraband or that they brought contraband to the hotel room of Accused No.4, the conviction of the Appellants in the Appeals, itself was set aside and they were set at liberty.

7] In the case of Simranjit Singh vs. State of Punjab, in Criminal Appeal No.1443/2023, by taking recourse to the case of Mohanlal (*supra*), a similar conclusion was drawn

8] In a recent decision of Mohammed Khalid and Another vs. State of Telangana in Criminal Appeal No.1610/2023, their Lordship of the Apex Court, while dealing with the Appeal of an Appellant, who was convicted under Section 8(C) read with 20 (b)(ii) (c) of the NDPS Act and who was sentenced to undergo RI for 10 years, recorded that seizure panchanama revealing recovery of contraband from the three bags was found to be contrary to the procedure prescribed and on finding that no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer, by preparing an inventory and obtaining samples in presence of the Judicial Magistrate, the report of the FSL was described as a waste paper and not capable of being read in evidence.

As a consequence the Appellants were acquitted of the charges.

9] Relying upon the aforesaid decisions, the learned Single Judge N.J. Jamadar, of this Court in the case of Aniodo Tochukwu vs. State

of Maharashtra, in Bail Application No.4148/2023, has recorded as under :-

“20. In the aforesaid view of the matter, the prosecution will have to surmount the hurdle of non-compliance of the provisions contained in Section 52-A of the Act, in the true spirit, in the sense that the samples were not drawn before, and certified by, the Magistrate. Resultantly, the Court may be justified in drawing an inference that the applicant may not be guilty of the offences under Section 22(c) and 29 of the Act”.

.. The Application was allowed on account of the aforesaid lacunae.

10] The principle flowing from the aforesaid line of precedents squarely apply here, as in the present case, admittedly samples were drawn without following Sub-Section (2) of Section 52A. The case of the prosecution, therefore, hinges on the doubtful seizure and since the Applicant is in custody for last three years, in absence of any antecedents, being reported against him, he deserve to be released on bail.

ORDER

- 1] Application for bail is allowed.
- 2] The Applicant Imran Kamaluddin Shaikh, shall be released on bail in connection with CR No.2 of 2020, registered with ATS Juhu Unit, on furnishing PR Bond to the extent of Rs.25,000/- with one or two sureties of the like amount.
- 3] The Applicant shall mark his attendance on first Monday of every trimester, between 5.00 p.m. to 6.00 p.m. and attend the trial on regular basis.
- 4] The Applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case so as to dissuade him from disclosing the facts to Courts

or any Police Officer. The Applicant should not tamper with evidence.

5] On being released on bail, the Applicant shall furnish his contact number, and residential address to the Investigating Officer and shall keep him updated, if there is any change.

[BHARATI DANGRE, J]