

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.3318 OF 2023

Sunday Eziko Ezagwu	vs.	...Applicant
The State of Maharashtra		...Respondent

Mr. Dilip Mishra i/b. Mr. Ayaz Khan, for the Applicant.
Mr. Shailesh Ghag, APP, for the Respondent/State.

CORAM : N. J. JAMADAR, J.
DATE : FEBRUARY 29, 2024

P.C.:

1. Heard the learned counsel for the applicant and the learned APP for the State.
2. The applicant who is a Nigerian national and arraigned in C.R. No. 1169 of 2021 registered with Mumbra police station for the offences punishable under sections 22(B), 22(C) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), has preferred this application to enlarge him on bail.
3. On the night intervening 28th and 29th November, 2021 a secret information was received by H.B. Kale, PSI at Mumbra police station that three persons were to come near dumping ground, Diva-Shil road, Thane to sell Mephedrone (MD). After complying with the statutory requirement, Mumbra police laid a vigil. At about 4.05 am three persons reached the said spot. When the police party moved to accost them two of them fled away. However, the applicant

was accosted. As the applicant appeared to be a foreign national, the applicant was apprised of his right under section 50 of the NDPS Act in English. As the applicant declined to avail the said right, the person of the applicant was searched in the presence of panch witness. In the front pocket of the trouser of the applicant, a plastic bag containing white substance was found. It appeared to be MD. It weighed 250 gms. The contraband article was seized and samples were collected. The applicant came to be arrested.

4. Mr. Mishra, the learned counsel for the applicant submitted that from the documents relied upon by the prosecution itself a serious doubt about the genuineness of the search and seizure arises. Secondly, the search has been carried out by the persons who are not authorized under section 42 of the NDPS Act. Thirdly, there is a complete non-compliance of section 52-A of the NDPS Act.

5. In the backdrop of the aforesaid submission of total non-compliance of the provisions contained in section 52-A of the Act, the learned APP was directed to take instructions as a letter dated 27th December, 2021 was purportedly addressed by the authorized officer to the jurisdictional Magistrate seeking an inventory. The learned APP submitted that the inventory, as mandated by section 52-A, has not yet been carried out and another communication was addressed on 27th February, 2024 to have such inventory.

Evidently, there is non-compliance of section 52-A of the NDPS Act.

6. Nonetheless I deem it appropriate to consider the first two submissions canvassed by Mr. Mishra. In the FIR, the first informant alleges that the applicant was accosted by the raiding party at about 4.05 am. Mr. Mishra invited attention of the Court to the seizure panchanama which indicates that it was commenced at 3.33 am and concluded at 4.55 am. Mr. Mishra would urge that the seizure panchanama could not have commenced at 3.33 am when the applicant was allegedly accosted at 4.05 am.

7. Prima facie, there is discrepancy in the time of the apprehension of the applicant and recovery of contraband article from the possession of the applicant. At one breath it is alleged that the applicant was accosted at 4.05 am whereas the seizure panchanama allegedly commenced at 3.55 am. This confusion is further confounded by the memorandum of seizure of property sent to the learned Magistrate, which shows that the contraband article was seized in the presence of panch witness on 29th November, 2021 at 3.15 am. Prima facie, it appears to be inconceivable that the contraband article could have been recovered from the possession of the applicant at 3.15 am when he was allegedly accosted on 4.05 am. Thus, there is substance in the submission on behalf of the applicant that the prosecution is required to surmount the

challenge of the search and seizure not being genuine, at the trial.

8. The second ground of search having not been carried out by a person who was authorized under section 42 of the NDPS Act also prima facie carries conviction. In the FIR as well as in the seizure panchanama, it is categorically recorded that the search of the person of the applicant was conducted by the panch witness and other police personnel on the directions of Mr. Shewale, PI, the authorized officer. Such a search by the persons who are not authorized even in the presence, or by the direction, of authorized officer has been held to be in breach of the provisions contained in sections 50 and 42 of the NDPS Act.

9. In the case of **Aarif Akram Shaikh vs. The State of Maharashtra**¹ a learned single Judge of this Court after referring to an earlier order in the case of **Hazi Mohd. Abdul Kadar Bhumedia vs. The State of Maharashtra**² observed that having regard to the language of section 42 of the NDPS Act only the officers mentioned therein are empowered to carry out the search. It may be that the PSI was authorized, but the search was also carried out by the Police Naik. The Police Naik was not authorized to carry out the search. Prima facie, the search carried out also by one of the officials (Police Naik), who was not authorized, renders the search

1 BA. No. 3158 of 2021 Dt.07/02/2023

2 BA. No. 378 of 2022

illegal. In the said case, the learned single Judge referred to a decision in the case of **Dilkush Sinai vs. State of Goa**³ where the PSI himself did not search the accused but directed the two panch witnesses to conduct the search and the question that arose was, whether search by panchas in the presence of PSI was legal. The Division Bench, in the said case, had held that the search was effected by person unauthorized to effect the search under the law and that the trial of the accused was vitiated as a result of said unauthorized illegal search.

10. In terms of the Notification issued by the State Government in the exercise of the power of Sub Section (1) of Section 42 of the NDPS Act, 1985, inter alia, all police officers of and above the rank of Head Constable in the State of Maharashtra are empowered for the purposes of Sub Section (1) of Section 42 of the NDPS Act, 1985. In the case at hand, prima facie, the search was conducted by an official who had not been empowered to carry out the search. Resultantly, the validity of the search and seizure becomes suspect.

11. The upshot of aforesaid consideration is that prima facie the search and seizure seems to be in breach of the statutory mandate. To add to this, as noted above, the discrepancies in the time of alleged recovery of the contraband article in the contemporaneous documents prima facie runs counter to the claim of genuineness of

³ 1995(2), Goa L.T.

search. In the aforesaid view of the matter, the first condition stipulated by section 37(1)(ii) of NDPS Act can be said to have been fulfilled. The Court is not informed that the applicant has antecedents.

12. The applicant has been in custody since 29th November, 2021. It is unlikely that the trial can be concluded within a reasonable period. I am, therefore, inclined to exercise the discretion in favour of the applicant.

Hence, the following order.

ORDER

- 1] The application stands allowed.
- 2] The applicant be released on bail in C.R. No. 1169 of 2021 registered with Mumbra police station, on furnishing a P.R. Bond of Rs. 1,00,000/- with one or more sureties in the like amount, to the satisfaction of the Special Court.
- 3] The applicant shall mark his presence at Mumbra police station on the first Monday of every month in 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] Subject to statutory regime which governs the stay of the applicant in India, the applicant shall not leave India without prior permission of the Special Court.

8] 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.)