2024:BHC-AS:15968

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.3338 OF 2023

Shrikant Arun Pingale ... Applicant
versus
The Union of India and Anr. ... Respondent

Mr. Ashok Mundargi, Senior Advocate i/by Ms. Pravada Raut, for Applicant.
Ms. Ameeta Kuttikrishnan, for Union of India.
Mrs. Geeta P. Mulekar, APP for State.

CORAM: N.J.JAMADAR, J.

HEARD ON : 19 MARCH 2024
PRONOUNCED ON : 3 APRIL 2024

P.C.

1. Heard the learned Counsel for the parties.

2. The applicant who is arraigned in NDPS Special Case No.1444 of 2022 arising out of C.R.No.20 of 2022 registered with Narcotic Control Bureau, Mumbai Zone, for the offences punishable under Sections 18(b), 23(c), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 has preferred this application to enlarge him on bail.

3. A specific information was received by IO, NCB that a contraband material was concealed in the courier parcel. Shippers address was Kalamuddin Qureshi and it was destined to be delivered to Aadil Ansari at Toranto, Canada. The said contraband was booked under Airway Bill No.2503926051. It was lying in the gateway of M/s. DHL Express India (P) Ltd.

4. After complying with the statutory requirements, NCB team intercepted the said parcel at Gateway of DHL Express India (P) Ltd. Carton box containing the parcel was opened. It contained cylindrical shaped water purifier. It was opened from both the sides. Three packets were found concealed in the purifier. All the three packets were opened and found to contain brown colour sticky substance. A small portion of each of the packets was tested with drug detention kit and the result of the test were positive for Hashish, a contraband substance. It weighed 4.88 kg. The entire substance was seized and sealed with the Label 'H'.

5. During the course of investigation it transpired that fake documents were used to ship the said parcel. The real consignor was Bhuval Kanta Yadav (A1). He was apprehended. In the voluntary statement recorded under Section 67 of the Act, Yadav (A1) revealed that Tejinder Singh @ Paji, the absconding accused, had procured the said contraband for further export. He had paid an amount of Rs.1 Lakh in cash to Yadav (A1). Out of the said amount, Rs.75,000/- were paid to the applicant who was running a franchise of courier company DTDC. As the investigation revealed the complicity of the applicant, the applicant came to be arrested on 11 June 2022.

6. Investigation further revealed that the applicant was in touch with the absconding accused. The applicant had sent another consignment in the past at the instance of the absconding accused and for the consignment in question, the applicant

had accepted an amount of Rs.75,000/-, though the normal courier charges were in the range of Rs.22,000/-.

7. Mr. Mundargi, learned Senior Advocate for the applicant submitted that the aforesaid circumstances pressed into service against the applicant to infer a conspiracy to export the contraband substance, do not make out a prima facie case qua the applicant. An endeavour was made to draw home the point that the circumstances are compatible with the innocence of the applicant. There is no material to indicate that the applicant knew that the parcel which was delivered contained contraband substance. Therefore, neither the applicant can be said to have been in conscious possession of the contraband substance, nor can the applicant be said to be a privy to the conspiracy.

8. Mr. Mundargi further submitted that the non-compliance of statutory provisions also makes out a prima facie case for grant of bail. Firstly, the panchanama indicates that the authorized officer had mixed the contents of all the three packets and, thereafter, the bulk was seized. Secondly, the inventory before the Magistrate was conducted belatedly. Thirdly, there was inordinate delay in forwarding samples for analysis. During this period, the contraband remained in the custody of the investigating agency and, thus, possibility of tampering cannot be ruled out. Therefore, the applicant deserves to be enlarged on bail.

9. Ms. Ameeta Kuttikrishnan, learned Special PP for Respondent No.1

countered the submissions of Mr. Mundargi. It was urged that the search and seizure had been carried out in conformity with the provisions of the Act, 1985. There was no delay in conducting the inventory as the requisition was sent to the Magistrate on 21 June 2022. Inventory was conducted on 15 July 2022. Samples, which were drawn before the Magistrate, were forwarded to the Laboratory on 16 July 2022. Therefore, there was no infraction of any of the requirements in the matters of seizure, sampling and even analysis.

10. To start with the submissions revolving around the non-compliance of the requirements in the matter of drawing of the samples, inventory before the Magistrate and forwarding of the samples. From the perusal of the complaint and the panchanama dated 10 June 2022, it becomes evident that upon opening the water purifier, three packets containing brown colour sticky substance were found. Panchanama records, a pinch of the substance was taken out from each of the three plastic packets and tested one by one with drug detention kit and the result of every test was positive for Hashish. Only thereafter, the whole brown colour sticky substance weighed on the digital weighing machine and kept in a single zip lock transparent plastic pouch.

11. Evidently, IO found the substance in each packet identical and pinch of the substance in each of the packet was tested with drug detention kit and it turned out to be positive for Hashish. Therefore, the submission that the mixture of contents of

all three packets denuded the sample the representative character, does not merit countenance.

12. On the aspect of delay in conducting an inventory, it appears the requisition was sent to the Magistrate on 21 June 2022 and the inventory was conducted on 15 July 2022. The investigating agency thus can be said to have approached the learned Magistrate for conducting the inventory within a reasonable period. Whether an interval of time of 10 days in approaching the Magistrate for conducting an inventory under Section 52-A of the Act, constitutes such a delay as to vitiate the inventory proceeding and, resultantly, the trial, in the circumstances of the case, would be a matter for adjudication at the trial. Undoubtedly, the Authorized Officer is enjoined to make an application to the Magistrate for the purpose of certifying the correctness of the inventory prepared by the Authorized Officer and for taking photograph of the recovered substance and allowing to draw representative samples of such drug or substance and certifying correctness of the list of the samples so drawn expeditiously. Where there is a delay, whether the delay vitiates proceedings and the consequent trial, would be a matter for adjudication at the trial.

12. Under sub-section (3) of Section 52-A of the Act, the Magistrate is enjoined to allow the application as soon as may be. In the case of **Union of India V/s. Mohanlal**[1]**,** the Supreme Court after analysing the provisions of Section 52-A of

1 (2016) 3 SCC 379

the Act, emphasised the necessity of the expeditious drawing of samples before and certification by the Magistrate. The Supreme Court, however, did not prescribe the time frame for the said exercise. It was, however, emphasised that the application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52-A. The observations in paragraph No.19 read as under :

> "19......There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52-A. We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this

country addresses a problem of such serious dimensions."

13. As noted above, in the case at hand, an application for inventory was made on 21 June 2022. The inventory was conducted on 15 July 2022. In the aforesaid view of the matter, I am unable to persuade myself to agree with the submission of Mr. Mundargi that there was such an inordinate delay in certifying the correctness of the inventory under Section 52-A of the Act, as to render the inventory infirm.

14. As regards the submission that the delay in carrying out the inventory and forwarding the sample is impregnated with the possibility of tampering with the contraband, suffice to note that whether there was tampering with or possibility of tampering with the recovered substance while it remained in the custody of the investigating agency during the said period, would again hinge on facts, which can be adjudicated at the trial.

15. The submission of Mr. Mundargi that the prosecution cannot draw any mileage from the statements of accused No.1 and the applicant recorded under Section 67 of the Act is, however, impeccable. In view of the pronouncement of the Supreme Court in the case of **Tofan Singh V/s. State of Tamil Nadu**[2] the confessional statement recorded under Section 67 of the Act, cannot be used as evidence against the accused. It has, therefore, to be seen whether there is

2 (2021) 4 SCC 1

independent material which otherwise reveals the complicity of the applicant.

16. Prima facie, there is material to show that the consignment in question was booked by the applicant. Kalamuddin Qureshi was shown to be the consignor and Aadil Ansari, the consignee. There is prima facie material to show that the accused No.1 had booked the consignment by forging documents. It could be urged that, at best, the applicant can be accused of negligence in not examining the genuineness of the documents which were used to book the consignment. But no element of criminality can be attributed to the applicant. Had there been no concomitant circumstance, such an argument could have been countenanced. However, there are circumstances which show to the contrary.

17. *De hors* the statements of the accused under Section 67 of the Act, there is material to indicate that the applicant was in touch with Tajinder @ Paji. The transcripts of the Whatsapp Chats between the applicant and the co-accused whose number was saved as Paji, indicate that the receipt of the parcel, its despatch and even payment were tracked. What exacerbates the situation is the conversation which indicates that the charges for the courier services were accepted through Hawala mode. The photograph of the currency note of Rs.20 deonomination was sent to the applicant and after showing the said photograph, Rs.75,000/- were allegedly paid to the applicant.

18. Secondly, there is a statement of the wife of the applicant, which

indicates that the actual courier service charages were Rs.22,246/- and the applicant had received Rs.75,000/- in cash. Mr. Mundargi attempted to salvage the position by submitting that there was no fixed rate for the charges for rendering courier services when the franchise was required to render services outside the city limits. Evidently, the value of the water purifier was Rs.8000/-. The normal courier charges were in the range of Rs.22,000/-. Not only the applicant had accepted Rs.75,000/-, but the amount was accepted in a manner which had the trappings of a Hawala transaction.

19. Thirdly, there is material to show that the applicant had exported the consignment in the past, at the instance of the absconding accused Tejinder @ Paji. All the three factors, if considered cumulatively, prima facie, point out to the complicity of the applicant.

20. At this stage, the nature of the satisfaction which the Court is required to record while releasing the accused on bail, where the interdict contained in Section 37 operates, is required to be noted. In view of the provisions contained in Section 37(1)(b)(ii) a person accused of an offence punishable under the Act involving commercial quantity cannot be released on bail unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty and that he is not likely to commit any office while on bail. The term "reasonable ground" has been construed to mean something more than *prima facie* ground. It connotes substantial probable cause for believing that the accused is not guilty of the offence charged and this reasonable

belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged **(Union of India vs. Shivshankar Kesari[3]).**

21. Applying the aforesaid test to the facts of the case, I am unable to persuade myself to hold that the applicant has made out a substantial probable case to believe that the applicant is not guilty of the offences for which he has been arraigned.

22. Hence, the following order :

ORDER

(i) The Application stands rejected.

(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.)

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3 (2007) 7 SCC 798.