

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.3337 OF 2023

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Salim Akbar Khan

...Applicant

vs.

The State of Maharashtra

...Respondent

Mr. Tabish Mooman, for the Applicant.

Mrs. G.P. Mulekar, APP, for the Respondent/State.

CORAM : N. J. JAMADAR, J.
RESERVED ON : MARCH 19, 2024
PRONOUNCED ON : APRIL 3, 2024

ORDER

1. Heard the learned counsel for the applicant and the learned APP for the State.

2. The applicant who is arraigned in NDPS Special Case No. 1538 of 2021 arising out of C.R. No. 55 of 2021 registered with Anti Narcotic Cell, Mumbai for the offences punishable under sections 21(c), 22(c), 27(a) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act, 1985) seeks to be enlarged on bail.

3. On 30th June, 2021 while the Anti Narcotic Cell police were on patrolling duty near Goregaon Bus Depot, New Link Road, two persons were found moving suspiciously. After noticing the police

party, they attempted to flee away. However, they were accosted. Entertaining suspicion that those persons might be carrying drugs, panch witnesses were called. The applicant and co-accused Sanjib Sarkar @ Raja Sarkar (accused No. 1) were apprised of their right to be searched before a Magistrate or gazetted officer. As they declined to avail the said right, the search was conducted. In the search of accused No. 1, 1.8 kg heroine and 1.1 kg Mephedrone (MD) were found. The contraband articles were seized and samples were collected. In the search of the applicant, a yellow cloth bag was found. It contained another transparent plastic pouch. The said pouch contained MD. It weighed 150 gms. Two samples weighing 5 gm each (E1 and E2) were collected and the bulk was labeled (E). The applicant came to be arrested.

4. Mr. Tabish Mooman, the learned counsel for the applicant, submitted that there is non-compliance of the mandatory provisions contained in section 52A of the NDPS Act, 1985. To fill in the lacuna the inventory was conducted before the learned Magistrate belatedly on 18th February, 2022. Such inventory is of no legal sanctity. In fact, the prosecution banks upon C.A report, on the basis of analysis of the sample (E1) collected at the time of alleged search and seizure. Therefore, ultimately the prosecution

case would fail for not adhering to the mandate of provisions contained in section 52A of the NDPS Act, 1985. It was further submitted that having regard to the fact that the applicant has been in custody for more than 2 years and 9 months, the applicant deserves to be enlarged on bail.

5. In opposition to this, Mrs. Mulekar, learned App resisted the prayer for bail. It was submitted that the trial has already commenced and two witnesses have been examined. At this stage, the applicant does not deserve to be released on bail. It was further submitted that the applicant can not urge the ground of non-compliance of section 52A of the Act as the inventory has been duly carried out. At any rate, the aspect of delay in compliance with the provisions contained in section 52A of the NDPS Act, 1985 would be a matter for consideration at the trial. Thus, the applicant may not be released on bail. The learned APP placed reliance on a decision of this Court in the case of **Mukesh Rajaram Chaudhari vs. The State of Maharashtra**¹.

6. The learned counsel for the applicant joined the issue by canvassing a submission that post the aforesaid decision, in the case of **Mukesh Chaudhari** (supra), another learned single Judge of

¹ BA No.54 of 2023 Dt,27/09/2023.

this Court in the case of **Jabir Nader Ali vs. The State of Maharashtra**² has released the accused on bail where there was a delay of about two years in carrying out the inventory, after referring to the aforesaid judgment in the case of **Mukesh Chaudhari** (supra). It was further submitted that in a recent pronouncement in the case of **Mohammed Khalid and another vs. The State of Telangana**³ the Supreme Court enunciated in clear and explicit terms that the FSL report based on the samples which are not drawn in the presence of the jurisdictional Magistrate is nothing but a waste paper and cannot be read in evidence. Therefore, having regard to the possible fate of the prosecution on account of inherent infirmity in the case due to samples having been drawn at the time of seizure, and the long period of incarceration, further detention of the applicant would be wholly unwarranted.

7. I have considered the submissions canvassed across the bar. From the perusal of the material on record, it becomes evident that the applicant was allegedly found in possession of 150 gm MD, a commercial quantity. Thus, the rigor contained in section 37(1)(b) (ii) of the NDPS Act, 1985 is attracted. Whether there is a

2 BA. No. 303 of 2023 Dt. 04/12/2023.

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

substantial probable cause to believe that the applicant may not be guilty of the offence for which he has been arraigned, deserves to be ascertained.

8. From the perusal of the FIR and the seizure panchanama, it becomes explicitly clear that after the applicant was allegedly found in possession of contraband, two samples (E1) and (E2) of 5 gms each out of the bulk of 150 gm were collected at the time of seizure itself. Forwarding letter (page 59) indicates that on the very next day of the seizure i.e. 1st July, 2021 the sample of the contraband (E1) allegedly recovered from the applicant, was forwarded for analysis along with samples (A1) of Heroine and (B1) of MD allegedly recovered from the co-accused.

9. The C.A. report, in turn, indicates that the report is based on the analysis of the samples received on 1st July, 2021 under the above referred forwarding letter. Thus it is evident that C.A report is based on the analysis of the samples drawn at the time of seizure. It appears that requisition for inventory was forwarded to the learned Magistrate on 28th January, 2022, after about seven months of the alleged seizure. The inventory was carried out by the learned Magistrate on 18th October, 2022. It is imperative to note

the Magistrate has categorically recorded that investigating officer had already forwarded the samples for C.A. Prima facie, it appears that there is non compliance of the mandate contained in section 52A as the samples were not drawn in the presence of the Magistrate and, thereafter, forwarded to C.A for analysis. Indubitably, C.A report is based on the samples which were drawn at the time of the alleged seizure.

10. In the case of **Alpeshkumar Sureshkumar Jain vs. State of Maharashtra**⁴, I had an occasion to deal with the ground of non-compliance of the mandate contained in Section 52A of the Act, in a little detail. It was observed as under:

“14. Plain reading of the aforesaid provisions would indicate that when any contraband / narcotic substance is seized and forwarded to the Officer in-charge of the nearest police station or to the officer empowered under Section 53 of the Act, the Officer referred to in sub-section (1) of Section 52-A shall prepare the inventory of contraband / narcotic substance containing details and the description of the seized substance, like quality, quantity, mode of packaging, marks, number or such other identifying particulars of the contraband or packing in which they are packed, country of origin and other particulars, as may be found relevant and make the application to any Magistrate for the purpose of certifying the correctness of the inventory so prepared and for taking photograph and certifying such photograph as true and for allowing to draw representative samples of such substance in the presence of such Magistrate and certifying the correctness of list of samples so drawn.

15. Sub-section (3) of Section 52-A enjoins the Magistrate to allow the application, as soon as may be. Sub-Section (4) of Section 52-A, which begins with non-

4 BA. No.1485 of 2023 Dt.31/01/24.

obstante clause qua Indian Evidence Act and the Code of Criminal Procedure, 1973, provides that every Court trying an offence under the said Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

16. In the case of Union of India V/s. Mohanlal and Anr.⁵ the Supreme Court held that the procedure prescribed in Section 52-A is of mandatory nature and it was obligatory to prepare an inventory of seized contraband and then make an application to the Magistrate for the purpose of getting its correctness certified. The observations in paragraphs 15 to 17 read as under :

“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.

5 (2016) 3 SCC 379

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.”

17. Following the aforesaid pronouncement, in the case of Jabir Nader Ali (supra), the learned Single Judge of this Court (Bharati Dangre, J.) held that the non-compliance of Section 52-A, within a reasonable time, gives rise to an apprehension that the sample which is alleged to have been drawn and sent for analysis, could have been tampered with and in absence of certification from the Magistrate that the sample has been correctly drawn, the benefit of doubt must necessarily yield in favour of the applicant.

18. At this stage, it is necessary to make a reference to another decision of the learned Single Judge of this Court (M.S.Karnik, J.) in the case of Mukesh Rajaram Chaudhari V/s. The State of Maharashtra⁶ wherein after an elaborate analysis of the provisions contained in the Act, 1985 and the judgments of the Supreme Court in the cases of Union of India V/s. Mohanlal (supra) and Simaranjit Singh V/s. State of Punjab⁷ the learned Single Judge posed a question, whether those judgments completely take away the discretion of the Court while considering the grant or refusal of the bail to an accused under the NDPS Act and the rigours of Section 37 of the Act stand lifted ?

The learned Single Judge answered the question as under :

“37. It is undoubtedly true that when the investigating agency has not followed the procedure under Section 52A of the NDPS Act, the deeming fiction of photographs, samples etc., being treated as primary evidence as provided under Sub-section (4) of Section 52A would not be available. However, the question is, is this the only mode in which the prosecution can

6 BA No.54 of 2023 dt. 27 Sept. 2023

7 2023 SCC Online SC 906

establish the charge against the accused? In this context, two scenarios are likely to arise. In both cases, let us assume that the prosecution has not followed the provisions of Section 52A and taken aid of the Magistrate in drawing the samples and sending for forensic analysis. In the first scenario, if the seized substance is still not destroyed and is available in the custody of the investigating agency, there is nothing to stop the said agency from following the full gamut of the procedure provided under Section 52A before destroying or disposing off the goods and then relying on the deeming fiction contained in Sub-section (4) of Section 52A of the NDPS Act. The only question in such a scenario would be why were such steps taken at a belated stage. Second scenario would be that the samples have been drawn, not in the presence of Magistrate and the goods have been destroyed with the permission of the Magistrate. In such a situation also, all that can happen is with the prosecution cannot avail of the deeming fiction provided in Sub-section (4) of Section 52A of the NDPS Act. This, however, does not mean that the prosecution cannot establish the charges against the accused through the means of other evidence available with it. For example, if the process of taking samples may not be in the presence of the Magistrate, but is shown to be properly followed with the aid of the support of the panch witnesses which the court finds believable and reliable, I do not see how the prosecution case would be destroyed totally. In either of the scenarios noted above, it would be eventually a question of what evidence is brought on record and how such evidence is to be evaluated. Both the aspects are in relation to conduct of trial. At the stage when the court is concerned with the question of granting or refusing bail, this cannot be the sole consideration. It may be one of the relevant considerations but cannot be the sole consideration on the basis of which the moment it is shown that the procedure under Section 52A of the NDPS Act is not followed, the accused automatically becomes entitled to bail as a matter of right. The rigors of Section 37 of the NDPS Act would continue to apply. Only when the bail court is satisfied that reasonable grounds of believing that the accused is not guilty of the offence and that he is not likely to commit any offence while on bail, the bail would be granted. I, therefore, do not find any merit in the submission of learned counsel for the applicant that in the present case non-compliance of Section 52A would entitle the applicant to bail."

19. It must also be noted that in the case of **Jabir Nader Ali (Supra)**, this Court noted the decision in the

case of Mukesh Rajaram Chaudhari (Supra), and yet, in the facts of the said case, found that an endeavour was made to comply with the mandate of Section 52-A in a perfunctory manner, and, thus, exercised the discretion to release the accused therein on bail.

20. The approach adopted by this Court in the case of Mukesh Rajaram Chaudhari (supra), cannot be said to be unsustainable. The endeavour of the Court was to balance the object with which the interdict contained in Section 37 of the Act, 1985 has been enacted with the imperativeness of following the mandatory provisions of the Act, 1985 which provide in built safeguard against the possibility of planting or false implication. The insistence on scrupulous compliance of the provisions which incorporate the safeguards, is premised on the stringent punishment which the offences entail and also a statutory bar in the matter of releasing the accused on bail.

21. A case of complete non-compliance of Section 52-A and the one with material to indicate that there was a substantial compliance or there was still possibility of compliance of Section 52-A of the Act, in my view, stand on different footings. It is in the aforesaid context, reference to the decisions of the Supreme Court in the case of Yusuf @ Asif V/s. State (supra), and Simaranjit Singh V/s. State of Punjab (supra), would be advantageous.

22. In the case of Yusuf @ Asif V/s. State (supra), the Supreme Court after following the decision in the case of Union of India V/s. Mohanlal (supra), enunciated, as under:

“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.”

23. In the case of Simaranjit Singh V/s. State of Punjab (supra), the Supreme Court after extracting the observations in paragraphs 15 to 17 (extracted above) in the case of Union of India V/s. Mohanlal (supra), observed that the act of the officer drawing samples from all the packets at the time of

seizure is not in conformity with the law laid down by Supreme Court Court in the case of Mohanlal (supra). That creates a serious doubt about the prosecution case that substance recovered was a contraband, and the Supreme Court, thus, set aside the judgment of conviction and sentence.”

11. The decision of the Supreme Court in the case of **Mohammed Khalid** (supra) firmly settles the issue. The Supreme Court observed, inter alia, as under:-

22] Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report (Exhibit P-11) is nothing but a waste paper and cannot be read in evidence. The accused A-3 and A-4 were not arrested at the spot. The offence under Section 20(b)(ii)(c) deals with production, manufacture, possession, sale, purchase, transport, import or export of cannabis. It is not the case of the prosecution that the accused A-3 and A-4 were found in possession of ganja. The highest case of the prosecution which too is not substantiated by any admissible or tangible evidence is that these two accused had conspired sale/purchase of ganja with A-1 and A-2. The entire case of the prosecution as against these two accused is based on the interrogation notes of A-1 and A-2.

(emphasis supplied)

12. In the light of aforesaid enunciation of law, the position which thus obtains in the facts of the case is that, the C.A. report is based on the samples which were drawn at the time of the alleged seizure. In the case of **Mohanlal** (supra) it has been categorically held that the procedure of collecting samples at the time of seizure is not envisaged by the provisions of NDPS Act, 1985. **Mohd Khalid**

(supra) rules in emphatic terms that the FSL report based on the samples which were not drawn in the presence of the Magistrate is bereft of any evidentiary value. As the prosecution in the case at hand proceeds on the strength of the C.A. report based on the analysis of samples drawn at the time of seizure, despite the belated compliance of the provisions contained in section 52A, the prosecution suffers from a significant infirmity which may justify an inference that the accused may not be guilty of the offence with which he has been arraigned. Resultantly, the first condition stands satisfied.

13. The Court is not informed that the applicant has such antecedents which dis-entitles him from bail. The second condition can also be said to be satisfied.

14. It is true the trial has commenced and two witnesses have been examined. However, having regard to the period of incarceration of the applicant and the apparent infirmity in the prosecution case, further detention of the applicant does not seem warranted. The applicant can be put to terms to ensure that the release of the applicant on bail does not put hindrances in the trial.

Hence, the following order.

ORDER

- 1] The application stands allowed.
- 2] The applicant Salim Akbar Khan be released on bail in C.R. No. 55 of 2021 registered with Anti Narcotic Cell, Mumbai, on furnishing a P.R. Bond of Rs. 1,00,000/- with one or more sureties in the like amount.
- 3] The applicant shall mark his presence at Anti Narcotic Cell, Mumbai on the first Monday of every month between 11 am to 1 pm for a period of three years or till conclusion of the trial, whichever is earlier
- 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] 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.)